

APPENDIX

Supreme Court, U. S.

FILED

JEC 16 1977

MICHAEL RODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1977

No. **77-873**

**SHEARN MOODY, JR., and**

**JOHN S. BLEKER,**

*Petitioners,*

VS.

**THE STATE OF TEXAS,**

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI  
TO THE COURT OF CIVIL APPEALS FOR  
THE TENTH SUPREME JUDICIAL DISTRICT  
OF TEXAS**

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Shearn MOODY, Jr., et al., Appellants,

v.

STATE of Texas, Appellee.

No. 5505.

Court of Civil Appeals of Texas,

Waco.

May 13, 1976.

HALL, Justice.

The substantive issue on this appeal is whether the trial court erred after a non-jury hearing in authorizing the ancillary receiver (in Texas) of Empire Life Insurance Company of America to cooperate in the consummation of a reinsurance contract between Empire's principal receiver (in Alabama) and Protective Life Insurance Company, an Alabama Corporation. We affirm the order.

There has been much related litigation in the courts of Texas and Alabama. Some is reported in *Day v. State*, 489 S.W.2d 368 (Tex.Civ.App.—Austin, 1973, writ ref., n. r. e.); *Empire Life Insurance Company of America v. State*, 492 S.W.2d 366 (Tex.Civ.App.—Austin, 1973, no writ hist.); *Moody v. Jones*, 519 S.W.2d 536 (Tex.Civ.App.—Austin, 1975, no writ hist.); *Moody v. State*, 520 S.W.2d 452 (Tex.Civ.App.—Austin, 1975, no writ hist.); *Moody v. Crook*, 520 S.W.2d 958 (Tex.Civ.App.—Austin, 1975, no writ hist.); and *Moody v. Moody National Bank of Galveston*, 522 S.W.2d 710 (Tex.Civ.App.—Hou. 14th. 1975, writ ref., n. r. e.).

Empire Life Insurance Company of America (hereinafter "Empire") is an Alabama corporation. Because of mergers with Texas companies, at least one-half of its policyholders are Texas residents. In June, 1972, Empire was found by the courts of Alabama to be insolvent, and was placed in receivership. Immediately thereafter, an ancillary receiver was appointed by the courts of Texas. Substantially all of Empire's physical assets are located in Texas. A major asset is an interest in the Libbie Shearn Moody Trust, which is administered by the Moody National Bank of Galveston, Texas. This interest was assigned to Empire by Shearn Moody, Jr. ("Moody"), an appellant here, who is the beneficiary of a lifetime income under the Trust. The other appellant, John Shearn Bleker, is Moody's cousin. He owns 300 shares of Empire stock and holds a \$5,000 paid-up Empire life insurance policy. Protective Life Insurance Company is an old-line, conservative company with over \$25,000,000 in capital and surplus, and with an excellent reputation. Its home office is in Birmingham.

As a result of Empire's insolvency, and after unsuccessful attempts to "rehabilitate" Empire, the States of Alabama, Texas, Arkansas, Montana, Nebraska, and Oklahoma suspended Empire's operations there and proceeded with plans for reinsuring the outstanding Empire insurance policies. On June 14, 1974, the reinsurance plan in question was approved by the Circuit Court for the Tenth Judicial District of Alabama, upon the application of the domiciliary receiver. On February 26, 1975, the order challenged on this appeal was rendered authorizing the Texas ancillary receiver to consummate the reinsurance agreement.

The appellants assert a number of reasons why they say the

agreement establishes unlawful discriminatory preferences among Empire's policyholders and creditors. We overrule these contentions.

The agreement is lengthy. The testimony relating to fairness *vel non* is voluminous. We need not detail either. The appellants' argument is erroneously based upon the premise that all Empire policies are alike and must therefore be treated identically in the reinsurance contract. The record shows that the policyholders come from many different companies with many different plans and policies, and it supports the determination that treating the different policyholders identically in the reinsurance plan and ignoring the various policy distinctions would result in unfair discrimination. Rather, the agreement identifies each unusual or unique group and treats it with special provisions formulated to produce equitable benefits for all. It is axiomatic that a different classification and treatment of persons based on real and substantial differences between them is not per se unlawful discrimination. See 12 Tex. Jur.2d 458, Constitutional Law, § 111. Such different treatment is often necessary, as it is here, to *avoid* unlawful discrimination.

The contract in question provides in meticulous detail how the disparate groups of Empire's policyholders shall be treated. The proof shows it to be much more detailed and carefully thought out than any other reinsurance bid received by the receiver. It guarantees the payment of all death benefits under all of the policies. However, the record shows that Empire's assets are worth millions of dollars less than the reserve liabilities of the policies Protective assumes under the plan; that Empire is in fact impaired in excess of \$10 million and is insolvent in excess of \$6 million. To off-set this multi-million dollar



gap the reinsurance agreement places a ten-year limitation called a "moratorium" of 35% on all cash benefits that can be exercised voluntarily by the policyholders. In other words, the moratorium reduces the reserves by limiting the amount of cash the policyholders may voluntarily withdraw under the terms of their policies. However, full policy benefits by the time of ending the moratorium are guaranteed by Protective to all accepting policyholders. Under the reinsurance contract, Protective receives no profits until the moratorium has been completely eliminated.

Obviously, policyholders who accept reinsurance and the eventual restoration of all policy benefits which come with it are treated differently from those who reject. But every policyholder has this choice and makes it voluntarily. At any given point in time all policyholders are treated precisely the same in relation to the moratorium. Different treatment as a result of a voluntary election can hardly be classified as arbitrary or unfair discrimination. In any event, the plan provides that Protective will transfer to the receiver assets equal in value to the reserve liability for every policy of every rejecting policyholder less the moratorium amount on each such policy. The Receiver can then pay this amount to the rejecting policyholder. This payment approximates the initial value of the agreement to policyholders who accept reinsurance, and thus produces equal treatment of accepting and rejecting policyholders as closely as it can be done.

In addition to the terms we have cited for payment of claims of rejecting policyholders, the agreement provides for the receiver to retain an additional \$2 million for payment of the

claims of other creditors which have not been assumed by Protective. Under the testimony, this fund is sufficient to treat all such claims equitably. There is no discrimination.

The appellants claim a violation of constitutional due process because the policyholders were not given notice of the hearing below. The appellants had notice of the hearing and participated in it. Accordingly, they have not suffered from the alleged unconstitutional act they assert, but are simply assuming to champion an alleged wrong of others. The general rule in constitutional litigation, applicable here, is that one may not assert the rights of third parties. *Corey v. City of Dallas*, 492 F.2d 496, 497 (5th Cir. 1974). The appellants have no standing to raise the point in question. *Armenta v. Nussbaum*, 519 S.W.2d 673, 679 (Tex.Civ.App.—Corpus Christi, 1975, writ ref'd, n. r.).

Moody made a written demand and fee deposit for a jury. He contends the order in question must be set aside because he was not accorded a jury trial. We disagree. The problem facing the court below was one of proper management and control of the assets of a receivership. It turned specifically on whether the proposed reinsurance agreement recommended by the Texas Receiver, an officer of the court appointed by the court, would serve the best interests of the Empire policyholders. Property held by a receiver is in *custodia legis*. It is the settled rule that questions concerning the management and control of such property are addressed to the sound discretion of the court without the interposition of a jury. *McHenry v. Bankers' Trust Co.*, 206 S.W. 560, 572 (Tex.Civ.App.—Galveston, 1918, writ ref.); *Ferguson vs. Ferguson*, 210 S.W.2d 268, 269 (Tex.Civ.

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App.—Austin, 1948, writ ref., n. r. e.), certiorari denied, 337 U.S. 943, 69 S.Ct. 1498, 93 L.Ed. 1747 (1949), rehearing denied, 338 U.S. 853, 70 S.Ct. 81, 94 L.Ed 523 (1949), rehearing denied 339 U.S. 916, 70 S.Ct. 559, 94 L.Ed. 1341 (1950).

The record does not show an abuse of discretion. The appellants' points and contentions are overruled. The judgment is affirmed.

**JUDGMENT RENDERED IN THE COURT OF CIVIL APPEALS, TENTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT WACO, ON MAY 13, 1976:**

Came on to be heard on the transcript of the record Cause No. 5505, entitled Shearn Moody, Jr., et al, appellants, vs. State of Texas, appellee, from 53rd District Court of Travis County; and the same being considered, it is the opinion of the Court there is no error in the judgment, it is adjudged and ordered that the judgment of the trial court is **AFFIRMED**. It is further ordered that the appellants, Shearn Moody, Jr., and John S. Bleker, Jr., as principals and Fidelity and Deposit Company of Maryland, as surety, pay all costs in this behalf expended and this decision be certified below for observance. Opinion by Justice Vic Hall.

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**COURT OF CIVIL APPEALS**  
**Tenth Supreme Judicial District**  
**P. O. Box 1606**  
**Waco, Texas 76703**  
**June 10, 1976**

Frank G. McDonald  
Chief Justice  
Vic Hall  
Associate Justice  
John A. James, Jr.  
Associate Justice

R. I. Gage, Clerk  
Pearl Reuwer, Deputy Clerk  
Telephone No. 753-7341  
Area 817

Newman, Shook & Newman  
4330 Republic National Bank Tower  
Dallas, Texas 75201

Honorable A. R. Schwartz  
U. S. National Bank Bldg.  
Galveston, Texas 77550

Honorable Joseph P. Webber  
Honorable Joe R. Long (Long and Evatt)  
P. O. Box 222  
Austin, Texas 78767

Re: Cause No. 5505 — Shearn Moody, Jr., et al., v.  
*State of Texas (Travis County)*

Gentlemen:

You are notified that Appellants' Motion for Rehearing in the above cause was **OVERRULED** on June 10, 1976, in the

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Court of Civil Appeals for the 10th Supreme Judicial District  
of Texas, at Waco.

Yours truly,  
R. I. GAGE, Clerk

By: \_\_\_\_\_  
Pearl Reuwer, Deputy Clerk

cc: Honorable John L. Hill  
Honorable James R. Irion, III  
Hon. Shannon H. Ratliff  
Hon. Drayton Nabors, Jr.

COURT OF CIVIL APPEALS  
TENTH SUPREME JUDICIAL DISTRICT  
WACO, TEXAS

ORDER  
JUNE 10, 1976

Motion No. 9018, Cause No. 5505 Shearn Moody, Jr., et al,  
appellants, vs. State of Texas, appellee, from Travis County;  
Appellants' Motion for Rehearing OVERRULED.

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**IN THE SUPREME COURT OF TEXAS**

No. B-6170

June 22, 1977

SHEARN MOODY, JR. ET AL.

VS.

THE STATE OF TEXAS

} Tenth District.  
From Travis County,

Application of petitioners for writ of error to the Court of Civil Appeals for the Tenth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused. (Justice Yarbrough not sitting)

It is further ordered that applicants, Shearn Moody, Jr. et al., and John S. Bleker, Jr., as principals, and Fidelity and Deposit Company of Maryland, as surety, pay all costs incurred on this application.



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**IN THE SUPREME COURT OF TEXAS**

No. B-6170

July 20, 1977

SHEARN MOODY, JR. ET AL.

VS.

THE STATE OF TEXAS

} From Travis County,  
Tenth District.

Petitioners' motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled. (Justice Yarbrough not sitting)

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**NO. 198,374**

STATE OF TEXAS

VS.

EMPIRE LIFE INSURANCE  
COMPANY OF AMERICA,  
ET AL

} IN THE DISTRICT COURT  
OF  
TRAVIS COUNTY, TEXAS  
53rd JUDICIAL DISTRICT

**OPPOSITION TO PLAINTIFF'S MOTIONS  
FOR SUMMARY JUDGMENT**

COMES NOW, Defendant Shearn Moody, Jr., and files this his Opposition to the Motions for Summary Judgment filed by the Attorney General and the Ancillary Receiver on certain issues in the above entitled and numbered case, and as grounds therefor would respectfully show the Court as follows:

I.

The Plaintiff in the above entitled and numbered cause, through the Attorney General and the Ancillary Receiver, has moved for Summary Judgment on the issue of whether this Court should approve the June 14, 1974 Order of the Circuit Court for the 10th Judicial District of Alabama in Equity, the Domiciliary Receivership Court in the receivership proceedings regarding Empire Life Insurance Company of America, which Order found that Empire is insolvent and incapable of rehabilitation, and gives authority to consummate a reinsurance agreement entered into between Empire and Protective Life Insurance Company. The Plaintiff has also moved for



Summary Judgment on the issue of whether the Court should make the temporary injunction entered into by this Court against Empire and the other parties permanent, and has moved for Summary Judgment on the issues of whether this Court should make the appointment of Herbert Crook as temporary Ancillary Receiver, permanent. However, as explained more fully herein, genuine issues of material fact presently exist in the above case on each of these issues. Moreover, Plaintiff is not entitled to Summary Judgment on these issues, as a matter of law. Accordingly, as discussed more fully herein, it would be improper and erroneous for this Court to grant Plaintiff's Motions for Summary Judgment on any of these issues.

## II.

### ISSUES OF FACT

#### 1. *Alabama Court Order Not Final.*

In 1972, in the Circuit Court for the 10th Judicial District of Alabama in Equity, Domiciliary Receivership proceedings were initiated against Empire Life Insurance Company of America. Defendant herein, Shearn Moody, Jr., is a stockholder in Empire Life Insurance Company of America and as such is an Intervenor in the above receivership proceedings. The present cause is the ancillary receivership proceeding, ancillary to the domiciliary receivership proceedings in the Alabama Court. On June 14, 1974 an Order was entered in the domiciliary receivership proceedings in Alabama, finding that Empire Life Insurance Company of America could not be rehabilitated and finding that it was in the best interest of

Empire policyholders to enter into a reinsurance agreement with Protective Life Insurance Company.

However, contrary to the assertion of the Plaintiff in this present case, the Order entered by said Court is not final. On October 14, 1974, Intervenor Moody filed his Motion pursuant to Rule 60(b) of the Rules of Civil Procedure of the State of Alabama for relief from the Order of June 14, 1974. A copy of said Motion is attached to Moody's Affidavit, which is attached hereto as Exhibit "A". According to Alabama law, said Order of June 14, 1974 is not final until Intervenor Moody's Motion under Rule 60(b) has been ruled upon. Such ruling has not yet occurred.

In the above-mentioned Motion by Intervenor Moody in the domiciliary receivership proceedings in Alabama, it is urged as follows:

1. That a recent post-judgment appraisal of the life estate of Shearn Moody, Jr. in the Libbie Shearn Moody Trust indicates that the Court erred in determining that Empire Life Insurance Company is insolvent

2. That the reinsurance agreement between Empire Life Insurance Company and Protective Life Insurance Company, as amended after the entry of the Order on June 14, 1974, shows that contrary to Alabama law, policyholders of Empire Life were being given preferential treatment over the creditors of Empire Life;

3. That during the course of the trial of the domiciliary receivership proceedings a witness in the proceedings, Mr. Herbert Crook, temporary Ancillary Receiver in the present case, presented a letter to the Court bearing upon the

issues before the Court *ex parte* without the knowledge of Moody or his counsel.

Contrary to assertions of Plaintiff, each of the matters asserted in Intervenor Moody's Rule 60(b) in the domiciliary receivership proceedings in Alabama presents genuine issues and material facts which are still pending before the Alabama Court. Accordingly, there are genuine issues of fact pending before the ancillary receiver proceedings in this present action concerning the authority of the Alabama Court to consummate the agreement between Empire and Protective Life Insurance Company, concerning the finality of the approval of said reinsurance agreement, concerning whether it is proper to make the Order granting temporary injunction in the present action permanent because of the present lack of finality in the receivership proceedings, and as to whether the temporary Ancillary Receiver in the present action, Herbert Crook, should be appointed permanent Ancillary Receiver, in light of the assertions and Intervenor Moody's Rule 60(b) Motion in the Alabama case.

*2. Questions of Insolvency and What is in the Best Interest of Texas Policyholders and Creditors are Still Before the Court.*

The Plaintiff is asking this Court to summarily approve the transfer of substantially all of the assets of Empire Life Insurance Company of America to Protective Life Insurance Company of Birmingham, Alabama. However, there has been no factual determination by this Court that Empire is even insolvent, and there has certainly been no determination by this Court as to what arrangement would be in the best interest of Texas policyholders and creditors. Both of these determinations involve issues of fact.

Since most of the assets of Empire are located in Texas, this Court has a special obligation to Texas policyholders and Texas creditors to insure that whatever arrangements made are in the best interest of those policyholders and creditors. However, under the Order of the Alabama Court, all of the assets of Empire, though primarily located in Texas, will be lumped together and treated as one, without any provisions for the protection of Texas policyholders and other creditors in relation to those assets. Moreover, under said Order this would be done without a full hearing by this Court that Empire is insolvent.

Under Article 21.28 Section 14 of the Texas Insurance Code, an Ancillary Receiver may enter into contracts or arrangements with Domiciliary Receivers in other states concerning the administration of the affairs of the receiverships only "under supervision of the Texas receivership Court". Approval of the Alabama Court's finding that the reinsurance agreement with Protective Life Insurance Company is in the best interest of Empire policyholders, including Texas policyholders, without any factual determination that Empire is insolvent and incapable of rehabilitation, and without any factual determination that the reinsurance agreement with Protective Life Insurance Company is in the best interest of all policyholders and creditors would be to approve the actions of the Ancillary Receiver and the Domiciliary Receiver without any supervision whatsoever, and would be directly contrary to Texas law.

Moreover, the solvency of Empire Life depends primarily upon the current evaluation of a two-fifths of a one-eighth life estate interest in the Libbie Shearn Moody Trust held by Empire. Defendant herein would show this Court that said



interest has value sufficient to make Empire a solvent corporation, and certainly not incapable of rehabilitation. Thus under Texas law, questions of material fact exist concerning the solvency of Empire Life Insurance Company and its ability to be rehabilitated and to question as to whether the proposed reinsurance agreement with Protective Life Insurance Company is in the best interest of all the policyholders and creditors, including Texas policyholders and creditors, and because of these issues of fact granting Plaintiff's Motions for Summary Judgment on certain applications would be completely improper.

### III.

#### AS A MATTER OF LAW, PLAINTIFF NOT ENTITLED TO SUMMARY JUDGMENT

##### 1. *Ancillary Receiver not even a Party to Reinsurance Agreement.*

As a matter of law, Plaintiff is not entitled to Summary Judgment on the application before this Court. Under Section 13 of Article 21.28 of the Texas Insurance Code the Ancillary Receiver has such rights and obligations with respect to assets located in this State as are possessed by a receiver of Domiciliary Insurer under the laws of this State. Under Section 2(b) of Article 21.28 of the Texas Insurance Code, title to the assets of Empire Life located in Texas is in this Texas Court or is in the custody of the receiver as soon as an Order directing the receiver take possession is entered. Thus, title to the assets of Empire Life located in Texas is in this Texas Court or in the Texas Ancillary Receiver. However, the Texas receiver is asking for approval by this Court of a contract which

disposes of Texas assets to which this Court, or the Ancillary Receiver, is not even a party. Such approval would be unlawful and directly contrary to Texas law.

Under the Texas Insurance Code, either the Court or the Ancillary Receiver must be a party to the contract disposing the Texas assets, or under Section 14 of Article 21.28, the Texas receiver must have entered into a contract with the Domiciliary Receiver concerning the administration of the affairs of the respective receiverships, subject to the approval of the Court. In present case, neither event has happened. Thus, since neither the Court nor the Ancillary Receiver is a party to the ancillary receivership agreement which approval is requested, nor has the Ancillary Receiver made a contract concerning the Texas assets with the Domiciliary Receiver in Alabama, as a matter of law Plaintiff is not entitled to Summary Judgment on the issues before this Court.

##### 2. *Summary Judgment Not Timely.*

It would further be contrary to Texas law to grant Plaintiff's Motion for Summary Judgment on the issues before the Court because in the Texas ancillary receivership proceedings, no time has yet been set for the filing of claims against the insurer. Under Section 3(a) of Article 21.28 of the Texas Insurance Code, filing of such claims shall be within the period of time as "specified by the Court." However, the Court at this time has not specified any time for the filing of such claims. The time for filing of such claims, as a matter of due process, must be prior to any determination concerning the disposition of assets by reinsurance of Empire. This is the only manner in which Texas policyholders or creditors

are given notice of the proposed disposition of assets and reinsurance agreement, and the only manner in which they may be heard on such issues and object to such proposal if they so desire. Without such notice to Texas policyholders and other creditors, Texas policyholders and creditors would be constitutionally denied due process.

The 14th Amendment of the United States Constitution requires that policyholders and creditors be given prior notice and hearing before assets in which they have an interest are sold.

This is especially true in light of the following:

1. Under the terms of the said reinsurance agreement Protective Life Insurance Company of America does not assume all the liabilities of Empire Life Insurance Company of America to its policyholders, but only a portion thereof. The reinsurance agreement provides for the transfer to Protective Life Insurance Company of America, except \$2,000,000. Accordingly, a policyholder who does not consent to reinsurance upon the terms stated in the reinsurance agreement would be left with nothing more than an unsecured claim against Empire Life Insurance Company of America, to share with other creditors in its assets after payment of all of administration expenses.

2. All the Empire Life Insurance Company of America assets are to be lumped together and transferred outside of Texas.

3. Under the present reinsurance agreement, Empire Life Insurance Company of America assets are to be transferred to Protective Life Insurance Company when the June 14,

1974 Order is final, regardless of the fact that problems may arise later with the Order or the Agreement.

Because no such notice has been given to the policyholders and other creditors as a matter of statutory and constitutional law, Plaintiff's are not entitled to summary judgment on the application before this Court.

### *3. The Alabama Court Order is an [sic] Appeal.*

The Order of the Court for the 10th Judicial Circuit of Alabama in Equity of June 14, 1974, has been appealed by the Intervenor Moody in that action and said appeal is presently pending. It has also been appealed by two creditors of Empire, G. L. Myer and W. B. Sanford. The grounds of said appeal involve questions both of fact and of law. One issue of fact involved in that appeal is the question of the evaluation of the Moody Trust interest, an issue identical to an issue of fact before this Court. Defendant Moody submits that Summary Judgment here is improper until those issues of fact have been finally resolved in the Alabama proceedings on appeal. Defendant Moody further submits that a ruling on Plaintiff's Motion for Summary Judgment would be improper at this time because of said appeal in that if the Order of June 14, 1974 of the Alabama Court is reversed, the parties to the present litigation would have spend needless time and expense in seeking relief from any Summary Judgment granted in this Court, and a great waste of judicial energy would be the direct result of such summary action.

The appeal further asserts that the June 14, 1974 Order is erroneous as a matter of law. The order gives the Domiciliary Receiver authority to consummate the Empire Life Insurance



Company and Protective Life Insurance Company reinsurance agreement even though, contrary to Alabama law, such agreement prefers policyholders over creditors. Contrary to Alabama law, the agreement also prefers Protective Life Insurance Company as a creditor. See *Melco System v. Receiver of Trans American, Inc.* 105 S.W.2d. 43 (1958).

In addition, said reinsurance agreement prefers certain policyholders over others, contrary to both Texas and Alabama law.

Under the terms of the reinsurance agreement dated September 25, 1968, between Empire Life Insurance Company of America and American Trust Life Insurance Company, all of the insurance policies and assets and liabilities of American Trust Life Insurance Company are to be treated as a separate entity for accounting purposes and Empire Life Insurance Company of America is to account to each such policyholder of American Trust Life Insurance Company who holds certain policies as described therein for his proportionate share of one-third of the earned surplus of such separate entity.

However, under the terms of the reinsurance agreement between Empire Life Insurance Company of America and Protective Life Insurance Company, there is no provision for segregating the policies, assets and liabilities acquired by Empire Life Insurance Company of America from American Trust Life Insurance Company or the payment to the policyholders of American Trust Life Insurance Company of their proportionate share of the said earned surplus.

#### IV.

In support of this Defendant's Opposition to Plaintiff's

Motions for Summary Judgment, the Affidavit of Shearn Moody, Jr. is attached as Exhibit "A" and said Affidavit is incorporated by reference herein.

WHEREFORE, Defendant Moody respectfully moves this Court to deny Plaintiff's Motions for Summary Judgment because, for the above-stated reasons, genuine issues of material facts are presently pending in this case and because Plaintiff is not entitled to Summary Judgment as a matter of law.

Respectfully submitted,

LAW OFFICES OF FRANK G. NEWMAN  
4330 Republic National Bank Tower  
Dallas, Texas 75201

By: \_\_\_\_\_  
FRANK G. NEWMAN

and

\_\_\_\_\_  
LAWRENCE G. NEWMAN

A. R. SCHWARTZ  
U. S. National Bank Bldg.  
Suite 1020  
Galveston, Texas 77550

By: \_\_\_\_\_  
A. R. SCHWARTZ

## EXHIBIT "A"

**AFFIDAVIT OF SHEARN MOODY, JR.  
IN OPPOSITION TO PLAINTIFFS'  
MOTIONS FOR SUMMARY JUDGMENT**

STATE OF TEXAS }  
COUNTY OF DALLAS }

BEFORE ME, the undersigned Notary Public, on this 6th day of November, 1974, personally appeared SHEARN MOODY, JR., who on oath did depose and say the following:

My name is Shearn Moody, Jr. I am currently residing at 8 Mill Road, Galveston, Texas. I am of lawful age and am competent to testify in all matters stated herein, and have personal knowledge of all matters stated herein.

I am currently, and have been since 1963, a stockholder in Empire Life Insurance Company of America.

In 1972, as a stockholder in Empire Life Insurance Company of America, I intervened and am presently a party in the case of the *State of Alabama, ex rel., John G. Bookout, Commissioner of Insurance, Plaintiff v. Empire Life Insurance of America, an Alabama corporation, Defendant* in the Circuit Court for the 10th Judicial District of Alabama in Equity, Case No. 171687.

On October 14, 1974, as Intervenor in that case, I caused to be filed a Motion under Alabama Rule 60(b) requesting relief from the Order entered by said Court on June 14, 1974. A copy of said Motion is attached hereto as Exhibit "A" and is incorporated by reference herein. I have personal knowledge

as to all the matters stated in said Motion and to the best of my knowledge and belief, all said matters are true and correct.

In the Alabama proceeding I expect to prove that Empire Life Insurance Company of America is solvent and that the proposed reinsurance agreement between it and Protective Life Insurance Company is contrary to Alabama law, because it gives preferential treatment to certain creditors of Empire Life Insurance Company of America.

The Order entered in the Alabama Court on June 14, 1974 is not final, at least until after the Rule 60(b) Motion, filed by myself, has been ruled upon. Said Motion has not yet been ruled upon.

In addition as a party to the Alabama case, I appealed the Judgment and Decree of the Alabama Court of June 14, 1974. Said appeal was based on errors both of fact and law made by the trial court.

**SHEARN MOODY, JR.**

SWORN TO AND SUBSCRIBED before me by Shearn Moody, Jr. to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged that he executed the same.

Margaret Day

Notary Public in and for  
Dallas County, Texas

My Commission Expires:  
June, 1975

STATE OF ALABAMA,  
EX REL,  
JOHN G. BOOKOUT,  
COMMISSIONER OF  
INSURANCE

PLAINTIFF

VS.

EMPIRE LIFE INSURANCE  
COMPANY OF AMERICA,  
an Alabama Corporation,

DEFENDANT

SHEARN MOODY, JR.

INTERVENOR

IN THE CIRCUIT COURT  
FOR THE TENTH  
JUDICIAL CIRCUIT  
OF ALABAMA  
(IN EQUITY)

CASE NO. 171-687

### **RULE 60(b) MOTION**

Comes now the Intervenor, Shearn Moody, Jr., pursuant to the provisions of Rule 60(b) of the Alabama Rules of Civil Procedure, and respectfully requests relief from the judgment and decree herein of June 14, 1974, on the following grounds:

1. That during the course of the trial of this case, in April of 1974, Herbert Crook, a witness and the Ancillary Receiver of Empire Life Insurance for the State of Texas, presented a letter to the Court directly bearing on the primary issues before the Court. Such letter was delivered to the Court *ex parte* without the knowledge of Intervenor, Shearn Moody, Jr., or his counsel. A copy of such letter is attached hereto as Exhibit "A."

2. That a recent, post-judgment appraisal of the value of the life estate of Shearn Moody, Jr. in the Libbie-Shearn Moody

Trust, prepared by Harold Crandal, FSA, indicates that the Court erred in determining that Empire Life Insurance Company is impaired and insolvent. A copy of said appraisal is attached hereto as Exhibit "B."

3. That the Reinsurance Agreement, in toto, as amended following the entry of judgment on June 14, 1974, shows that the policyholders of Empire Life Insurance Company are being given preferential treatment over the other creditors of Empire Life Insurance Company contrary to the laws of the State of Alabama.

PREMISES CONSIDERED, Intervenor respectfully requests the Court to set aside its decree of June 14, 1974, grant a new hearing, and grant whatever further relief may be just and proper.

SIROTE, PERMUTT, FRIEND & FRIEDMAN, P.A.

BY: James A. Hamm Jr.

Attorneys for Intervenor  
2030 First Federal Building  
Birmingham, Alabama 35203



**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the within and foregoing Rule 60(b) Motion upon all counsel of record by mailing a copy of same to each, United States mail, postage prepaid and properly addressed, on this 14th day of October, 1974.

---

James A. Harris, Jr.

The foregoing motion is set for hearing before the Hon. William C. Barber at 10:00 o'clock A.M. on the 15 day of November, 1974.

---

James A. Harris, Jr.

**STATE BOARD OF INSURANCE**

1110 San Jacinto  
Austin, Texas 78786

April 19, 1974

The Honorable William C. Barber, Circuit Judge  
10th Judicial Circuit of Alabama in Equity  
Birmingham, Alabama

Dear Sir:

"Some question has been raised, as we understand it, concerning the authority of the Commissioner of Insurance of Texas to make certain recommendations regarding the future of Empire Life Insurance Company of America, an Alabama company licensed to do the business of life, health and accident insurance in the State of Texas.

The State Board of Insurance is the insurance regulatory body in the State of Texas provided by the Insurance Code of this State. Article 1.02 of said Code provides that insurance regulatory duties are "vested in the State Board of Insurance as a body, . . . (except as to certain exceptions not pertinent here) and they shall be exercised, performed, carried out and administered by the Commissioner of Insurance as Chief Executive Administrative Officer of the Board . . . ."

The Insurance Code also provides in Article 3.55-1, Section 3, as follows:

"The Commissioner of Insurance is authorized to enter into arrangements or agreements with the insurance regulatory authorities of other jurisdictions concerning the management, volume of business, type of risks



to be insured, expenses of operation, plans for reinsurance, rehabilitation or reorganization, and method of operations of an insurance company that is licensed in such other jurisdictions and that is deemed to be in a hazardous financial condition or needful or specific remedies which may be imposed by the Commissioner of Insurance and insurance regulatory authorities of such other jurisdictions."

It is the position of the State Board of Insurance that the Commissioner of Insurance, in connection with the recommendations concerning Empire Life Insurance Company of America which have been presented to you, had discretionary authority and exercised that authority within the limits provided to him and that the Board does not have concurrent jurisdiction with him over the matter.

Sincerely,

STATE BOARD OF INSURANCE

---

JOE CHRISTIE, Chairman

---

NED PRICE, Member

---

DURWOOD MANFORD, Member

**Receiver's Exhibit 6**  
**TREATY OF ASSUMPTION AND**  
**BULK REINSURANCE**

This Agreement is made and entered into in Birmingham, Alabama, as of this 31st day of May, 1974, effective as stated hereinbelow, by and between JOHN G. BOOKOUT, Commissioner of Insurance, State of Alabama (herein the "Receiver") in his capacity as Receiver of Empire Life Insurance Company of America, an Alabama corporation, in receivership (herein "Empire"), and PROTECTIVE LIFE INSURANCE COMPANY, Birmingham, Alabama, an Alabama corporation (herein "Protective").

I. *Identity of Protective.* Protective was incorporated under the laws of the State of Alabama on July 24, 1907, is qualified to do business as a capital stock legal reserve life and health insurance company and had capital and surplus of \$25,969,339.96 as shown in its 1972 Annual Statement, of which \$19,369,339.96 was indicated as surplus, and as of September 30, 1973 had approximately \$26,013,065 of capital and surplus. The executive offices of Protective are located in Birmingham, Alabama.

II. *Identity of Empire; Consideration.* Empire was incorporated under the laws of the State of Alabama on June 27, 1963. At its inception and at various dates thereafter Empire both assumed business from, and ceded business to, various other insurance companies as well as directly issuing life, health and accident and annuity policies. By order of the Circuit Court for the Tenth Judicial Circuit of Alabama (herein "Court") in Equity Case No. 171-687, entered June 29, 1982, Empire was found to be impaired and the Honorable John G. Bookout, Com-

missioner of Insurance, State of Alabama, was named Receiver. The Receiver having determined that the full rehabilitation of Empire did not appear feasible, the Receiver has advertised under order of the Court dated September 12, 1973, for proposals for assumption of the outstanding insurance policies of Empire, and this Agreement is submitted in response to such advertisement and shall constitute a firm and binding contract with Protective when and if accepted by the Receiver and approved by order of said Court, provided, however, that if not so accepted and approved by January 31, 1974 (unless such time be hereinafter extended in writing by Protective), this Agreement shall be null and void and of no further effect.

III. *Effective Date.* The Effective Date of this Agreement shall be 12:01 A.M., C.S.T., on the ..... day of ..... 197 . . . , which shall not be a date prior to January 1, 1974.

IV. *Definitions.* As hereinafter used, the following terms shall have the meanings set out below and none other:

A. "Empire Policies" shall mean (1) all life insurance, accident and health and annuity contracts or policies which have been either (i) issued by Empire prior to the Effective Date of this Agreement or (ii) assumed by Empire prior to June 29, 1972, and (iii) which had not been ceded by Empire to, and assumed by or purportedly assumed by, some other company prior to June 29, 1972, (2) all supplemental contracts issued by Empire as a consequence of the policies defined in (1) above, and (3) all supplemental benefits or riders issued in connection with the policies defined in (1) and (2) above. It is expressly understood that the term "Empire Policies" shall not refer to any policy issued on Protective forms as a result of conversion

privileges or purchase options contained in Empire Policies.

B. "Old National Policies" shall mean only that specific block of paid-up insurance which had been written or assumed by Empire and which on or about June 19, 1967, Empire ceded to Old National Insurance Company, Montgomery, Alabama, an Alabama corporation (herein "Old National") and Old National assumed in a reinsurance agreement. Inasmuch as Old National has been found to be insolvent and the receiver of Old National is seeking to set aside and declare void the assumption of the Old National Policies from Empire and is asserting that such policies are the liability of Empire, the "Old National Policies" are a subject of this Agreement as set forth hereinbelow.

C. "Withdrawable Funds" shall mean any funds that may be withdrawn under the terms of a policy by voluntary action of the insured or other owner of such policy and shall normally be equal to the policy cash value plus the cash value of any paid-up additions, any dividend accumulations, any pure endowment accumulations or coupon accumulations, any prepaid premiums on the policy and any contingent pure endowment payments, less all outstanding policy loans.

D. "United Founders Treaty" shall mean that certain Reinsurance Treaty entered into by Empire and Republic Investors Life Insurance Company, East Moline, Illinois, now called United Founders Life Insurance Company of Illinois (herein "United Founders") on or about April 3, 1968.

E. "Assumed Policies" shall mean Empire Policies, Old National Policies, the United Founder Treaty and any policies assumed by Protective after the Effective Date hereof as a result

of or arising out of the administration of the Empire Assets (as defined in Section IX.A.).

V. *Cession and Transfer by Receiver.* The Receiver on behalf of Empire agrees to transfer, assign, cede, deliver and convey, and does hereby transfer, assign, cede, deliver and convey, to Protective, by way of total reinsurance, subject to the terms, conditions and provisions hereof, (1) all of the rights, privileges and prerogatives of Empire in and to those certain policies and contracts of insurance identified herein as Old National Policies and Empire Policies, (2) all rights, claims and interests which Empire has against, or in the receivership estate of, Old National, whether on account of attempted or actual rescission of the 1967 reinsurance agreement referred to in Section IV.B. or otherwise, and (3) all of the rights, privileges, prerogatives, contracts, agreements and treaties of reinsurance and/or co-insurance (without assumption) with other insurance companies covering risks of Empire reinsured and/or co-insured with other insurers and covering risks of other insurers ceded to and reinsured and/or co-insured (without assumption) by Empire in effect on the Effective Date hereof, including, but without limitation, all rights and interests of Empire under the United Founders Treaty.

Receiver further agrees to transfer to Protective, subject to the terms, conditions and provisions hereof, all assets of Empire except as specified hereinbelow in Section VII, and agrees to execute any and all documents and take all other action deemed advisable by Protective to effectuate or facilitate the transfer of assets or other assignments and transfers contemplated by this Section V.

Protective agrees to accept the assets so transferred and assigned subject only (without assumption) to the mortgages and other liens and encumbrances thereon but only to the extent that the same are disclosed in Empire's 1972 Annual Statement.

VI. *Assumption by Protective.* Protective does hereby reinsure and assume as of the Effective Date (subject to the terms, conditions and provisions, and only to the extent as, hereinafter specifically provided) the liability of Empire under the Empire Policies and, if any, under the Old National Policies (except as provided hereinbelow), subject, however, to any and all defenses or offsets against the claims and actions on said policies which would have been available to Empire or Old National (as applicable) had this Agreement not been made, and further does hereby assume as of the Effective Date (subject to the terms, conditions and provisions, and only to the extent as, hereinafter specifically provided) all of the rights, privileges, prerogatives, contracts, agreements, treaties or reinsurance and/or co-insurance with other insurers (without assumption) referred to in Section V and the obligations thereunder. The terms and conditions of such assumption are as set forth below in this Section VI and in the remaining provisions of this Agreement:

A. *Old National Policies.* Protective shall endeavor to enter into an agreement with the receiver of Old National to assume the Old National Policies subject to the terms and conditions hereinbelow in Sections VIII, VII and XIV and agree that, if such an agreement cannot be reached, a court of arbitration shall be appointed consisting of three arbitrators, one selected by the Commissioner of Insurance, State of Alabama, one by the Commissioner of Insurance, State of Texas, and one by Pro-



protective, and such court of arbitration shall, after a hearing, draft a reinsurance agreement as to the Old National Policies not inconsistent with any provision contained in this Agreement which shall be binding on said receiver and Protective but limited to policyholder liabilities arising from the Old National Policies. The terms and provisions of Section XVII, except as to the composition of court, shall apply. After the proper execution of such reinsurance agreement on behalf of Old National with all necessary Court or regulatory agency approvals thereof, and after the effective date of such agreement, for the purposes of this Agreement, Old National Policies shall be thereafter considered to be Empire Policies as defined.

After the Effective Date hereof and prior to the effective date of such an agreement, if any, Protective shall pay valid claims under the terms of said Old National Policies on account of deaths occurring on and after the Effective Date (and prior thereto as specified in Section VI.E. below) to the extent that such claims have not been previously paid by either Empire or Old National; provided, however, that (1) Protective shall have all defenses or offsets against claims and actions upon said policies which would have been available to Old National or Empire had this Agreement not been made, (2) no such payment or payments shall be deemed evidence of, or any admission that, the Old National Policies are Protective's obligations to any greater extent than they were liabilities of Empire prior to this Agreement or that Protective is hereby or otherwise assuming any greater obligations on account of Old National Policies than Empire had prior to the Effective Date hereof or otherwise, and (3) that payment of such claims by Protective

shall be taken into account and allowed for in any reinsurance agreement with Old National's receiver.

Protective further agree that, as described further in Section VIII.C. below, any amounts received by Protective from Old National's receiver on account of rescission of the 1967 Empire-Old National reinsurance agreement shall be applied to reduce the Moratorium Amounts otherwise applicable to Old National Policies and shall be included in the Empire Assets for the purposes of accounting under this Agreement, all as provided for hereinafter.

*B. United Founders Treaty.* Protective agrees to assume Empire's obligation to United Founders under the United Founders Treaty subject to the moratorium provisions set forth below in Section VIII relating to such treaty. Protective further agrees to assume Empire's obligations under Paragraph 10 of the United Founders Treaty to administer directly under certain conditions the United Founders policies related thereto. Protective agrees that in the event it shall be required under said Paragraph 10 to so administer policies or if it shall elect under Paragraph 12 of said treaty to assume directly the United Founders policies related thereto, there shall be no change in the status of the policyholder thereof nor shall any moratorium be placed in effect against them. In the event of such assumption, the policies so assumed by Protective shall be considered to be "Empire Policies" for all purposes of this Agreement except that they shall not be subject to the provisions of Section VIII and XII relating to Moratorium Amounts and revision of dividend provisions.

*C. Third Party Indemnity Reinsurance Agreements.* Protective accepts and assumes as of the Effective Date all right, title



and responsibilities of Empire under "third party indemnity reinsurance agreements" by which is meant those reinsurance and/or co-insurance agreements with other insurance companies covering risks of Empire reinsured and/or co-insured with other insurers, without assumption, and covering risks of other insurers ceded to and reinsured and/or co-insured by Empire, without assumption. It is not the intention of the parties to affect, nor shall any provisions of this Agreement be construed as affecting, in any way, such reinsurance of a portion of the risk under some of the Empire Policies with any third party reinsurer under existing indemnity reinsurance agreement between Empire and such companies, although Protective expressly reserves the right, and anticipates that it shall exercise the right, under the recapture clause contained in said agreements to adjust the retention on the Empire Policies to Protective's retention levels.

D. *Reinstatement.* Protective agrees to assume Empire's obligation to reinstate any policy which is or should have been in the classes assumed under this Agreement which on the Effective Date hereof by its terms was entitled to reinstatement, provided that all requirements necessary to procure reinstatement of such a policy under its terms are fulfilled to the satisfaction of Protective. Upon such reinstatement of any such lapsed policy, it shall for all purposes be treated as if it had been in force from the date on which it lapsed except that it shall be subject to all of the terms and conditions of this Agreement as may pertain to the class of policy in which it was or should have been.

E. *Pending and Unreported Claims.* Protective agrees to assume Empire's liability in connection with all outstanding claims on Empire Policies or Old National Policies, whether in

process of settlement or incurred but not yet reported as of the Effective Date, provided, however; that Protective does not assume liability on any claim which has heretofore been rejected by Empire or Old National, as applicable, whether or not such claim is being contested in the courts, it being understood that any contingent liability on account of any such rejected claim shall remain the liability of Empire or Old National, as applicable.

F. *Commissions.* Protective agrees to assume Empire's liability with respect to any commission due for premiums collected by Empire before June 29, 1972, but only to the extent that such commission was included in the liabilities reported in the Annual Statement of Empire as of December 31, 1972 and reflected on Empire's books and records. It is expressly understood that Protective is not assuming any obligation for commissions not reflected on such Annual Statement or due on account of premiums collected after June 29, 1972 or to be collected in the future.

G. *Liabilities Not Assumed.* Protective does not assume any liability to policyholders, stockholders or creditors of Empire or Old National not specifically set forth above. In amplification but without limitation of the generality of the foregoing statement, Protective does not assume any liability and shall have no liability for:

1. Any obligation of Empire on account of agreements entered into with other companies under which Empire ceded, and such companies assumed or purportedly assumed, policies issued or assumed previously by Empire (except as set forth in Section VI.A. above).

2. Any claim by creditors of Empire on account of any obligation not arising out of any policy or contract specifically assumed above.

3. Any claim by any person, firm or corporation on account of any guaranty or endorsement or other agreement by Empire with respect to funds borrowed by or advanced to employees, subsidiaries, affiliates or any person, firm or corporation, related or unrelated, whether or not Empire had guaranteed or endorsed such advances or loans prior to the Effective Date hereof.

4. Any dividend claimed by any policyholder of American Trust Life Insurance Company or by any other person, firm or corporation, which dividend was not (a) previously declared by Empire and (b) either (i) paid to the policyholder or (ii) included in the provision for dividend accumulations or for paid-up additions, as shown in Empire's Annual Statement of December 31, 1972. Any such claim alleged on account of any policy, whether or not such policy is assumed by Protective under this Agreement, shall be the sole liability of Empire.

5. Any surplus debenture or other evidence of indebtedness whatsoever issued by Empire or by any company and assumed by Empire prior to the Effective Date hereof.

6. Any obligation for commission which may have been due on account of premiums collected or to be collected after June 29, 1972.

7. Any and all obligations for unpaid premium taxes.

8. And deficiency with respect to any mortgage on real estate transferred to Protective.

#### VII. *Assets to be Transferred.*

A. The Receiver on behalf of Empire agrees to transfer,

assign, deliver and convey to Protective, and take all necessary action and execute all appropriate documents to convey to Protective good and merchantable legal title to, all assets of Empire, except that Receiver may retain the sum of Two Million Dollars (\$2,000,000) in cash or liquid assets to be used to pay the expenses of the receivership and to satisfy creditors for liabilities not assumed by Protective hereunder. In the event that the Receiver shall have settled with all such creditors and there shall be left to the account of Empire under the administration of the Receiver any funds, then if Moratorium Amounts (as defined) are still outstanding against any policies which are the subject of this Agreement or if the Moratorium Amounts shall have been cancelled on account of the expiration of the fifteen year period referred to in Section VIII.D.3. below, then such funds in the account of Empire shall be transferred to Protective to be added to the Empire Fund (as defined below) for use in further reducing the outstanding Moratorium Amounts or to reimburse Protective for any prior reduction of Moratorium Amounts pursuant to the terms hereinafter set forth.

B. If, as of the Effective Date hereof, Protective shall not have received authorization under the respective Insurance Holding Company System Regulatory Acts of Nebraska or Arkansas, or both, to assume control of Lincoln Life and Casualty Company or of Investors Preferred Life Insurance Company, respectively, then the Receiver shall, as escrow agent for the benefit of Protective, continue to hold all Empire's shares of common stock of National Insurance Company of America or Investors Preferred Life Insurance Company, as the case may be, in trust for Protective until such authorization has been obtained, and when so obtained the Receiver shall transfer the shares evidenc-



ing said common stock to Protective as promptly as practicable. With respect to all securities to be transferred by Receiver to Protective, Protective hereby represents to Receiver that it is taking said securities for investment and not with a view to distribution.

C. The assets of Empire to be transferred to Protective shall be valued for statutory purposes and in determination of the amount of the Empire Fund (as defined) as follows:

1. *Bonds, Real Estate, Mortgages, Collateral Loans and Preferred Stocks.* Empire's bonds, real estate, mortgages, collateral loans and preferred stock shall be transferred to Protective at a value equal to their admitted asset value to Empire on the Effective Date hereof. Said value, adjusted thereafter as required by proper statutory accounting, shall be used in determining the admitted asset value to Protective of such assets and in determining the value of the Empire Fund.

2. *Common Stocks.* All commonstocks owned by Empire shall be transferred to Protective at their market value as of the Effective Date hereof and shall be valued thereafter in determining the value of the Empire Fund at the market value at the valuation date in question, except that stock of "affiliates", as defined in the Alabama Insurance Holding Company Systems Regulatory Act, shall be valued in accordance with Section 3 thereof, and provided further, if there is no readily ascertainable market value for a common stock, Protective shall make a reasonable attempt to obtain a reasonable value for such security, which value shall be its value for Empire Fund purposes. However, if a value for a common stock cannot be reasonably obtained, such stock shall be treated as having no value for

Empire Fund purposes but shall remain an asset of the Empire Fund.

3. *Furniture, Equipment and Supplies.* In lieu of any separate accounting for all furniture, equipment and supplies of Empire, Protective shall credit the Empire Fund with One Thousand Dollars (\$1,000) and shall have no obligation thereafter to account for such assets in the Empire Fund or otherwise for the purposes of this Agreement.

4. *Agents' Debit Balances.* No value shall be placed on the agents' debit balances of Empire; however, any amounts recovered on account of such balances shall be credited to the Empire Fund.

5. *Libbie Shearn Moody Trust Interests.* For the purposes of Protective's Annual Statement and the determination of the amount of the Empire Fund, the interest in said Libbie Shearn Moody Trust shall be valued at that certain value established by the N.A.I.C., that is, Four Million Two Hundred Fifty Thousand Dollars (\$4,250,000). Protective shall be entitled to increase or decrease such stated value if it appears warranted, provided, however, that such adjustment must be acceptable or required for statutory accounting purposes in Protective's Annual Statement. Receiver represents and warrants to Protective that (i) the Libbie Shearn Moody Trust is a valid and enforceable trust with a duration at least as long as the life of Shearn Moody, (ii) Empire has a valid, enforceable and assignable right to 40% of the life interest of Shearn Moody in one-eighth (1/8) of the income of said Trust, and (iii) those certain insurance policies issued on the life of Shearn Moody by Empire State Life Insurance Company of Houston, Texas, designated as Policy Nos. YT-206948-A, YT-208415 and 69YT-208623, as-



sumed on December 31, 1972 by National Western Life Insurance Company, Denver, Colorado, each containing provisions providing for renewal of such coverage until the policy anniversary nearest the insured's sixty-fifth birthday and providing total death benefits in the event of Shearn Moody's death in the amount of Twelve Million Dollars (\$12,000,000.00) shall be in force on the Effective Date hereof on a premium paying basis with premiums due thereon paid to the next policy anniversary of each such policy, and the Receiver further agrees that ownership of these policies shall be transferred to Protective and that Protective shall be named the sole beneficiary under all such policies.

6. *Other Assets.* All other assets shall have the normal values assigned to them pursuant to statutory accounting principles and practices.

It is expressly recognized by the parties to this Agreement that the foregoing valuation methods and the values expressed therein or derived thereby are for purposes of statutory accounting and determination of the amount of the Empire Fund and shall not be construed as constituting stipulated values for federal income tax purposes. For federal income tax purposes, the value of the foregoing assets shall be determined in accordance with the normal accounting principles and practices for such transactions. It shall be assumed that the value utilized for such assets in federal income tax returns of Protective shall be the value to Empire for tax accounting purposes of these assets.

VIII. *Moratorium.* Inasmuch as the assets of Empire are insufficient to meet its liabilities including reserves, it is necessary to, and Protective shall, place a moratorium against the

Withdrawable Funds under the policies assumed by Protective hereunder in accordance with the following agreements:

A. *Basis of Moratorium Amounts.*

1. With respect to policies described in Section IV.A. and IV.B. and not described hereinbelow in this paragraph A, the initial Moratorium Amount shall be determined based on the Withdrawable Funds of the policy as of the Effective Date hereof and a policy without Withdrawable Funds shall not be subject to any moratorium. However, for the purposes of determining the initial Moratorium Amount of any policy, any policy loan requested of Empire subsequent to June 29, 1972 shall be disregarded.

2. With respect to the separate accounts maintained on account of policies issued by Empire Life Insurance Company of America, Little Rock, Arkansas, on Form PSIP-1, the Arkansas separate account, and by National Union Life Insurance Company on Form SPP50, the Alabama separate account, the initial Moratorium Amount as of the Effective Date hereof shall be figured against the total values of those separate accounts and if any amount is allocable to a policyholder under the terms of any such contract, the pro rata portion of the then current Moratorium Amount relating to the total separate account involved shall also be allocated to such policyholder. If the amount of the accumulation of any such policyholder in the separate account is to be paid out in cash, such payment shall be reduced by such Moratorium Amount and the acceptance of such amount by the policyholder or other recipient shall constitute full release of Protective with respect to the Moratorium Amount retained. If the amount of such payment is to be added

to the dividend accumulating otherwise credited to such policy, which shall constitute the standard procedure in such case unless the policyholder specifically requests otherwise in writing, then the Moratorium Amount shall be added to and increase the Moratorium Amount otherwise outstanding on such policy.

3. With respect to the United Founders Treaty, the initial Moratorium Amount shall be calculated based upon the total policy reserves on policies covered by such treaty, less the total policy loans and net deferred and uncollected premiums as of the Effective Date (hereinafter said adjusted total policy reserves being referred to as "Net Reserves").

#### *B. Effect of the Moratorium.*

1. With respect to those policies described in Section IV.A and IV.B., the moratorium shall not affect any contractual policy benefit except as provided under Section XII with respect to dividends and except as provided below with respect to cash surrenders, policy loans, partial withdrawals, policy conversions or similar policy options and privileges, and determination of nonforfeiture benefits, and the moratorium shall reduce these benefits as follows:

(a) If such a policy is surrendered, the applicable Moratorium Amount shall be deducted from the cash value otherwise payable under the terms of the policy. Acceptance of such reduced cash value by the policyholder shall be a total release of all claims against Protective on account of or in any way arising out of the policy. If any policy shall contain a provision under which the policyholder may continue such policy as paid-up insurance, in whole or in part, without supplying evidence of insurability, or may take a cash payment in lieu

thereof, regardless of the description in the policy of such payment, it shall be construed as a cash surrender for purposes of the moratorium.

(b) The Moratorium Amount, while not requiring interest, shall otherwise be treated as an addition to any outstanding policy loans for the purposes of applying any policy provisions relating to or referring to policy loans, conversions, exchanges, and similar options and privileges, except that it shall not reduce any death benefit or any benefits payable on maturity of the policy as an endowment other than as specified in subsection (a) above.

(c) If a policyholder has any option, right or privilege to withdraw any amounts from the policy prior to maturity, such option, right or privilege shall only permit withdrawal of funds otherwise available in excess of the Moratorium Amount.

(d) If the policy shall be placed on reduced paid-up or extended term insurance, the amount of the reduced paid-up or the amount and period of such extended term insurance, as the case may be, shall be computed based upon a value equal to the value specified to be used in the policy reduced by one-half of the then applicable Moratorium Amount. The death benefit thus reduced shall not be increased thereafter on account of any subsequent reduction in the Moratorium Amount. The current Moratorium Amount shall be continued against such paid-up insurance, subject to reduction as provided in Section VIII.D. below, and shall be deducted from the cash surrender value of such paid-up insurance if it shall be surrendered before Moratorium Amounts are cancelled and likewise shall be deducted for the purposes of determin-



ing available policy loan values. Notwithstanding the foregoing, the reinstatement provisions of the policies shall still be effective.

(e) Any policy which became reduced paid-up or extended term insurance after June 29, 1972 and prior to the Effective Date shall have benefits based upon the foregoing provisions except that the Moratorium Amount shall be computed on Withdrawable Funds as of the date such reduced paid-up or extended term insurance became effective.

2. With respect to the United Founders Treaty, no death benefits shall be affected; however, any cash surrender value payable to United Founders under the terms of the Treaty on account of the surrender of a policy covered by such Treaty shall be reduced by an amount equal to the product of such cash value times a fraction the numerator of which is the then current Moratorium Amount on the Treaty and the denominator of which is the then current Net Reserve under the Treaty, both values being computed as of the date of surrender of such policy. The Moratorium Amount of the Treaty shall be reduced by the amount of such cash surrender value reduction. Such cash surrender value reduction shall be permanent and United Founders shall have no further claim against Protective on account of such policy surrender, whether or not the Moratorium Amount is subsequently reduced as hereinafter provided for. With respect to policy loans under the United Founders Treaty, inasmuch as the Treaty makes no specific provision for participation by Empire in policy loans prior to the assumption date of any such insurance by Empire but Empire has been participating in such policy loans, any policy loans after the Effective Date hereof shall be solely for the account of United Founders

and United Founders shall bear all increase in aggregate outstanding policy loans thereafter from its own assets until such time as the ratio of the aggregate outstanding policy loans borne by United Founders on policies under the Treaty (whether incurred before or after the Effective Date hereof) to the aggregate outstanding policy loans on such policies equals the ratio of the then current Moratorium Amount on the Treaty to the total Net Reserves under the Treaty. Thereafter, Protective shall share proportionally in future policy loans. In the event Protective directly assumes the policies covered by the Treaty, United Founders shall not be reimbursed by Protective in any way on account of existing policy loans at the time of assumption.

#### *C. Moratorium Amounts.*

1. With respect to those policies described in Section IV.A., the initial Moratorium Amount shall be thirty-five percent (35%) of the Withdrawable Funds as of the Effective Date.

2. With respect to the separate accounts, the initial Moratorium Amount shall be thirty-five percent (35%) of the total value of those accounts at the Effective Date.

3. With respect to the United Founders Treaty, the initial Moratorium Amount shall be thirty-five percent (35%) of the Net Reserves under the Treaty as of the Effective Date.

4. With respect to the Old National Policies, the initial Moratorium Amount shall be one hundred percent (100%) of the Withdrawable Funds and shall so remain even if Moratorium Amounts on other policies are lowered, until the reinsurance agreement between Protective and the receiver of Old National referred to in Section VI.A. is effective. As of the effective date of such reinsurance agreement, the Moratorium Amount on each



Old National Policy shall be adjusted to be equal to the product of the Withdrawable Funds multiplied by a fraction the numerator of which is the sum of (1) the reserves for all in-force Old National Policies; plus (2) all claims incurred on such policies after June 19, 1967 which were paid by Protective or Empire or which Protective is hereby obligated to pay after the effective date of such reinsurance agreement, less (3) the value of any assets transferred by the receiver of Old National to Protective pursuant to such reinsurance agreement, and the denominator of which is the reserves for all in-force Old National Policies. Such Moratorium Amount for any of the Old National Policies shall not exceed one hundred percent (100%) of the Withdrawable Funds of the policy as of the effective date of such reinsurance agreement.

*D. Reduction and Cancellation of Moratorium.*

1. If the Empire Fund, as described in Section IX, shall exceed one hundred five percent (105%) of the Empire Liabilities as defined in Section X less the then outstanding aggregate Moratorium Amounts as of December 31 of any year, then as of April 1 of the following year, all the then outstanding Moratorium Amounts shall be proportionally reduced to such an amount that, as of such December 31, the Empire Fund would have equaled one hundred and two percent (102%) of the Empire Liabilities less the outstanding reduced Moratorium Amounts.

2. If after any such adjustments as described in D(1) next above, the then outstanding Moratorium Amounts shall be less than one hundred twenty percent (120%) of one year's annual premium on all premium paying Empire Policies in force on

such December 31, all outstanding Moratorium Amounts shall be cancelled on April 1, and Protective shall thereafter pay all policy benefits in full except as hereinafter provided in Section XII with respect to dividends and except with regard to policies with reduced paid-up or extended term benefits elected after June 29, 1972 and prior to such cancellation.

3. If there are any Moratorium Amounts outstanding at the expiration of a period of fifteen (15) years after the Effective Date of this Agreement, all such Moratorium Amounts shall be cancelled.

4. Protective shall have the right at any time and from time to time to voluntarily reduce or eliminate any or all Moratorium Amounts, in its sole discretion, whether or not required by any provision hereof.

5. When all Moratorium Amounts are cancelled, Protective shall be relieved from any responsibility or accountability for separate fund accounting for any policy previously affected by the Moratorium Amounts hereunder.

*E. Statutory Treatment of Moratorium Amount.* The Moratorium Amounts shall be treated as a credit against the reserve on the applicable policies in the Annual Statements of Protective.

*IX. Empire Fund.* The "Empire Fund" shall consist of:

A. The "Empire Assets" which shall include:

1. All assets, other than cash or equivalents and other than the furniture, equipment and supplies described in Section VII C.3 transferred to Protective under Section VII hereof prior to the disposal thereof by Protective;

2. Property acquired by Protective from the disposal of property otherwise defined as an "Empire Asset" or transferred to Protective by the receiver of Old National under the provisions of Section VI.A.; and

3. Policy loans and net due and deferred premiums on Assumed Policies, plus

B. A share in Protective's fixed income investments, sometimes referred to as "commingled assets", the amount and yield of which shall be determined as follows:

1. Cash and equivalents transferred to Protective but not included in the assets under Section IX.A.1. above, plus the \$1,000 stipulated payment under Section VII.C.3. shall be treated as invested as a part of all fixed income investments made by Protective in the first calendar quarter after the Effective Date hereof, and such assets shall be assumed to have the same yield as the average of all such investments made in said quarter.

2. Thereafter, an amount shall be treated as invested during the year in which the same becomes available, which amount is equal to the sum of (i) the profits to Protective on disposal of any Empire Asset, plus (ii) the increase in Empire Liabilities, plus (iii) the Empire Operating Earnings (as hereinafter defined) or less the losses thereof, plus (iv), in the year received, any cash transferred to Protective by the receiver of Old National under the provisions of Section VI.A. or from the Receiver of Empire under Section VII.A. on account of settlement of all outstanding creditor claims or under Section XIV, less (v) losses on disposal of Empire Assets, and less (vi) decreases in Empire Liabilities, said sum to be increased

or decreased, as applicable, by the change in total value of Empire Assets other than that change caused by revaluation of any Empire Assets. This amount shall be invested and commingled with Protective's fixed income investments for said year and shall be credited thereafter with the yield equal to the average long term fixed yield rate obtained by Protective on its fixed income investment made in the year such amount is treated as invested (as information, this rate was 9.21% in 1971, 9.23% in 1972 and is anticipated to be between 8% and 9% in 1973). If the amount calculated as specified hereinabove in this subparagraph (2) is negative, the Empire Fund shall be debited as if a portion of the commingled assets referred to above had been sold and the adjustment to yield on commingled assets due to such assets deemed to have been sold shall be determined on the basis set forth above.

C. The requirements for maintenance of the Empire Fund while any Moratorium Amounts are outstanding shall in no way limit Protective's right, in its sole and absolute discretion, to dispose of any of the Empire Assets as it may deem desirable or advisable.

X. *Empire Liabilities.* "Empire Liabilities" shall equal:

A. All reserves and other liabilities of Protective arising from the Assumed Policies; plus

B. Any debt, loss reserves or other liabilities of Protective either existing at the Effective Date hereof or arising thereafter on account of the Empire Assets.

XI. *Empire Operating Earnings.* "Empire Operating Earnings" for any years will be determined as equal to:

A. (1) premiums and other considerations received by Pro-

protective on Assumed Policies less any third party indemnity reinsurance premiums paid by Protective on Assumed Policies; plus

(2) investment income on the Empire Fund which shall be all investment income received on account of Empire Assets plus the assumed yield on the commingled assets described in Section IX.B., less investment expenses defined below in Section XI.D.; plus

(3) any miscellaneous income received by Protective in connection with the Assumed Policies, less the sum of:

B. (1) all benefits and dividends paid on the Assumed Policies; plus

(2) the increase in Empire Liabilities for the year; plus

(3) premium taxes incurred on the Assumed Policies; plus

(5) an expense allowance for Protective equal to ten dollars (\$10.00) per premium paying Assumed Policy and five dollars (\$5.00) per paid-up Assumed Policy in force at the beginning of the year; plus

(6) any extraordinary expenses arising out of the Assumed Policies which would not normally be incurred in the course of the transaction of life insurance business by Protective, including those expenses involved in maintaining and operating an office in Dallas, Texas and the current data processing system used by Empire until administration of the Assumed Policies can be efficiently transferred to Protective's Birmingham Main Office, plus the identifiable costs of such transfer.

C. Empire Operating Earnings shall be increased or decreased, as appropriate, by the marginal change in Protective federal income tax liability arising as a result of the consummation of this Agreement or from Empire Assets, Empire Liabilities and Empire Operating Earnings in the current year.

D. "Investment Expenses" as used hereinabove shall be equal to the sum of:

(1) all out-of-pocket expenses specifically incurred in connection with the Empire Assets, including, but not limited to, all expenses incurred in connection with the administration of real estate transferred to Protective by Empire, and

(2) premiums paid on insurance policies covering the life of Shearn Moody and protecting Protective's life interest in the Libbie Shearn Moody Trust as described in Section VII.C.5. hereof, and

(3) 5.5% of all investment income credited in Section XI.A.2. above, as an administrative charge for supervision of such investments.

E. Protective shall have the right to use reasonable approximations in making the calculations called for by the foregoing provisions. To the extent not otherwise specifically provided for in the foregoing, such amounts shall be calculated in accordance with statutory insurance accounting principles and practices as used in Protective's Annual Statement.

## XII. Dividend Provisions Superseded.

A. *Revision of Dividend Provisions.* Certain policies assumed by Empire from American Trust Life Insurance Company specifically included provisions by rider or in the basic



policy which specified dividend levels as a percent of earnings on American Trust Life business. Empire assumed such obligations upon assumption of such policies but Protective is not willing to assume such obligations. Other policies either issued or assumed by Empire, by policy provision, written or implied sales materials or oral representations may have created similar obligations or created the expectation of similar obligations on the part of the insured, and Protective is not willing to accept and assume any such obligation. Therefore, as a condition precedent to the assumption of any policy by Protective under this Agreement, it is agreed that the owner of any Assumed Policy which is participating or in any other way has a claim against the earnings of the issuer thereof expressly must agree, and by failure to reject the Certificate of Assumption as hereinafter provided such policyholder shall be deemed to have agreed to the following reformation, modification and amendment of each such policy with regard to the payment of dividends:

1. If a policy is participating or contains any provision which may be construed to be a claim upon the earnings of the company issuing or assuming the policy or the policyholder of such policy claims any such right for any reason, the following provision shall be substituted for any or all such provisions of the existing policy:

*Dividends.* Any dividend paid on this policy shall be as declared in the sole and absolute discretion of Protective and no contractual provision or written or oral promise, express or implied, heretofore made to the policyholder shall bind Protective to declare or pay any dividend. Protective may, in its sole and absolute discretion, declare no dividend or a dividend in such amount as it may deem advisable.

2. Each person or expressly rejecting, and thereby accepting, an assumption agreement from Protective pursuant to the terms hereof shall be deemed to have released Protective (1) from any and all obligation under such policy or otherwise to declare any dividend whatsoever on such policy and (2) any liability for any misrepresentation or fraud of any person with respect to any statement regarding dividends on the policy.

However, the foregoing shall not be construed to apply to the guaranteed minimum of ten dollars (\$10.00) per One Thousand Dollars (\$1,000) "dividend" provided under Form PSIP, the President's Special Investors Plan, issued by Empire Life Insurance Company of America, Little Rock, Arkansas and assumed by Empire, which dividend commitment is in the nature of a pure endowment or coupon benefit and accordingly will be paid by Protective in the same manner as such benefits.

*B. Contingent Paid-Up Additions.* Protective has no obligation to declare dividends on any participating policy of Empire. If, however, in its sole and absolute discretion, Protective should determine that dividends of some amount should be paid to such policyholders while Moratorium Amounts are still outstanding, it is hereby specifically agreed that Protective may declare contingent paid-up addition dividends prior to the time all Moratorium Amounts are removed as provided in Section VIII.D. above but a declaration of such dividends shall in no respect be deemed to be a waiver by Protective of its right not to declare such a dividend at any time in the future or on any other policies. Such contingent paid-up addition dividends shall provide an increase in death benefit in the event the insured shall die while such contingent paid-up addition dividends are outstanding on the policy. However, in the event the

policyholder shall surrender his policy or elect a reduced paid-up or extended term insurance benefit under the nonforfeiture provisions of any such policy, the policyholder shall lose all claim on such contingent paid-up additions and Protective shall have no further obligation on account thereof. Such contingent paid-up additions shall cease to be contingent when all Moratorium Amounts have been cancelled on all policies and at that time shall become regular paid-up additions. The determination of equitable treatment between classes of policyholders shall be made in the sole and absolute discretion of Protective.

*C. Dividends After the Moratorium Period.* Protective agrees that when all Moratorium Amounts have been cancelled, it shall attempt to place any of the Assumed Policies that are then participating on a basis of substantial equity with similar policies issued by Protective at the same time as the Assumed Policy but only with respect to dividends for those years after the amount of the Empire Fund shall exceed the amount of the Empire Liabilities. Such dividends shall be payable only at the sole and absolute discretion of Protective and the policyholder shall be entitled to elect any form of dividend payment option normally available to Protective's participating policyholders; however, if no option election is filed with Protective after the Effective Date hereof and prior to such dividend payment, the paid-up addition option shall be deemed to have been elected. The determination of a basis of substantial equity between classes of policyholders shall be in the sole and absolute discretion of Protective.

*XIII. Assumption Certificates.* Protective agrees that, as promptly as possible after the Effective Date hereof, it shall issue to each policyholder whose policy is reinsured by it here-

under an assumption certificate dated as of the Effective Date and substantially in form and with the provisions set out in Exhibit "A" attached hereto and made a part hereof [ or with such modifications as may be approved by the Receiver], subject to (i) the written terms and conditions of each such policy, as modified by this Agreement and (ii) any and all offsets, counterclaims, cross-actions and defenses which are now or may hereafter become available to Empire or Protective, and all such offsets, counterclaims, crossactions and defenses held, owned or possessed by Empire are hereby transferred, assigned and conveyed by it and the Receiver to Protective. Such assumption certificate shall be mailed by Protective by first class mail addressed to the policyholder at the address shown upon the records of Empire.

*XIV. Right to Reject Assumption.* It is specifically recognized and agreed by the parties hereto that each of the policyholders of any policy which is the subject of this agreement has a valid claim against the receivership estate of Empire in an amount equal to the Withdrawable Funds of his or her policy. Each policyholder affected by this Agreement shall have the right and privilege of an election either to accept in full the terms of this Agreement and the assumption certificate or to reject the same in full in writing by filing such rejection at the office of John G. Bookout, Receiver, within sixty (60) days after such assumption certificates are mailed to policyholders. All policyholders who have not so rejected this Agreement and the assumption certificate within such period shall be conclusively deemed and considered to have accepted all provisions of this Agreement and the assumption certificate and to have further agreed that Protective, on behalf of all such policy-



holders against whose policies and contracts any moratoriums have been placed, shall have the right to file a claim with the Receiver in the amount of the total of the moratoriums. Any dividend distributions on such claim received by Protective from the Receiver shall be added by Protective to the Empire Fund. It is agreed and understood that Protective shall have no obligation with respect to such claim or the prosecution or collection thereof other than the filing thereof with the Receiver and the acceptance and application, as described above, of any dividend distributions Protective may receive as a result of such claim. Protective agrees to transfer to the Receiver assets equal in value to the assets herein transferred to Protective covering the reserves on policies of such policyholders who may reject this Agreement and assumption certificate within the period specified above, less the applicable Moratorium Amount on each such policy. Any such policyholder rejecting this Agreement and the assumption certificate by giving written notice thereof to the Receiver within such period will be entitled to make his own claim directly to the Receiver and shall receive no benefit under or by virtue of this Agreement.

**XV. Premiums and Other Receipts.** All premiums and payments on any policies assumed by Protective which are paid by the policy owners on and after the Effective Date hereof shall be the sole property of Protective, and neither the company, nor receivership estate thereof, from which such policies were so assumed shall have any right, title or interest therein. All moneys, checks, drafts, money orders, postal notes, and other instruments received by the Receiver for premiums on the policies assumed under this Agreement and attributable to periods after the Effective Date shall be forthwith transferred and de-

livered to Protective and any such instruments when so delivered shall bear all endorsements required to effect the transfer of same to Protective. The Receiver and Protective agree that Protective shall have all of the rights of Empire under outstanding bank draft authorizations from policyholders which authorized Empire to draw on the policyholders' bank accounts to pay premiums on the policyholders' insurance policies transferred by the Receiver to Protective, so far as permitted by the laws of the applicable states, and Protective, as part of this Agreement, assumes the guaranty obligations of Empire with respect only to such bank draft authorizations outstanding as of the Effective Date hereof. Protective shall have the right and authority to collect for the account of Protective all receivables and other items which shall be transferred by the Receiver to Protective and to endorse without recourse and without warranties of any kind the name of Empire on any checks or other evidences of indebtedness received by Protective on account of any such receivables or other items. Receiver agrees to execute all documents or instruments as may be necessary to assure that any endorsement in accordance with the provisions of this paragraph by Protective of Empire's name shall be recognized and accepted. The Receiver agrees that he will transfer and deliver to Protective any cash or other property that the Receiver may receive with respect to such receivables or other items.

**XVI. Records.** The Receiver agrees to deliver to Protective all of Empire's files and records relating to policies ceded hereunder and assets transferred hereunder. Protective agrees that the Receiver shall be entitled to inspect, audit and copy any and all of such records thereafter if needed to carry out the further duties of the receivership.



XVII. *Arbitration Clause.* All disputes or differences between the two contracting parties arising under or relating to this Agreement upon which an amicable understanding cannot be reached shall be decided by arbitration pursuant to the terms of this section, except that the court of arbitrators for the matters set forth in Section VI.A. of this Agreement shall be constituted as provided therein.

The court of arbitrators provided for herein shall place a liberal construction upon this Agreement in light of the prevailing customs and practices for reinsurance in the life insurance industry, free from legal technicalities, for the purpose of carrying out the intent of the parties.

The court of arbitrators, which shall be held at the home office of Protective in Birmingham, Alabama, shall consist of three arbitrators who must be officers of life insurance companies familiar with the reinsurance business, other than Protective.

Within thirty (30) days of written demand of either party to arbitrate any dispute arbitrable under this Section XVII, each of the parties shall appoint an arbitrator, notifying the other party of the name and address of such arbitrator. The two arbitrators so appointed shall thereupon select a third arbitrator. If either party shall fail to appoint an arbitrator as herein provided, or should the two arbitrators so named fail to select a third arbitrator within thirty (30) days of their appointment, then, in either event, the President of the American Life Insurance Association or its successor shall appoint such second and/or third arbitrator. The three arbitrators so selected shall constitute the court of arbitrators.

A decision of a majority of said court shall be final and binding and there shall be no appeal therefrom. The court shall not be bound by legal rules of procedure or evidence but shall establish its own procedures and receive evidence in such a way as to do justice between the parties. The court shall enter an award which shall do justice between the parties and the award shall be supported by written opinion.

The costs of arbitration, including the fees of the arbitrators, shall be borne by the losing party unless said court shall decide otherwise.

XVIII. *Conditions Precedent.* In addition to any other conditions precedent to Protective's obligations hereunder which may have been hereinabove set forth, Protective shall have the right, in its sole discretion, prior to the Effective Date hereof, to terminate and render void this Agreement, without liability to any person therefor or hereunder, upon the failure of the Receiver to tender or furnish to Protective, no later than five (5) days before said Effective Date, except with respect to (a) which shall be furnished fourteen (14) days before said Effective Date, any one or more of the following:

(a) (i) the Trust Agreement and related documents establishing that the Libbie Shearn Moody Trust is a valid and enforceable trust with a duration at least as long as the life of Shearn Moody and (ii) all documents necessary to show a valid, enforceable and assignable right in Empire to 40% of the life interest of Shearn Moody in one-eighth (1/8) of the income of said trust;

(b) duly executed, legally binding and assignable notes from the policyholders for each policy loan (except pre-

mium loans) shown on Empire's books with the face amount of none of such loans exceeding, except nominally, the cash surrender value of the respective policy (tender at the Empire home office shall be deemed compliance with this provision);

(c) evidence that all notes and mortgages to be transferred to Protective are valid and binding; evidence of full fire and extended coverage insurance on the real property subject to such mortgages; and evidence of the assignability thereof to Protective;

(d) title binders from approved solvent title insurance companies on all real estate with individual values in excess of \$100,000 to be transferred to Protective sufficient to insure Protective's title in amounts not less than those shown in Empire's 1972 Annual Statement with respect to each parcel of real estate and showing Empire's ownership to be free and clear of all liens and encumbrances except those disclosed in Empire's 1972 Annual Statement;

(e) all equity and debt securities of Empire to be transferred hereunder in form for transfer (except to the extent provided for in Section VII.B. hereof), free and clear of all liens and encumbrances except as disclosed in Empire's 1972 Annual Statement;

(f) a schedule of all assets to be transferred; and

(g) (i) evidence that the representations of the Receiver contained in Section VII.C.5. are true and (ii) the policies on the life of Shearn Moody referred to in Section VII.C.5. in the full amount stated therein, and forms with all signa-

tures thereon necessary for assignment to Protective as owner and beneficiary as of the Effective Date.

Protective shall further have said right to terminate prior to the Effective Date upon the occurrence of any of the following facts (or opinion in the case of subparagraph (c) ):

(a) that those assets of Empire to be transferred are not those shown in the 1972 Annual Statement or assets of equivalent value substituted therefor, except that certain assets may be or may have been sold under Court order between December 31, 1972 and the Effective Date and the cash proceeds thereof shall constitute part of the \$2,000,000 not to be transferred;

(b) that there has been at any time up to the Effective Date any damage, destruction or loss not fully covered by insurance materially and adversely affecting any assets to be transferred to Protective;

(c) that, in the opinion of counsel for Protective, the interest in the Libbie Shearn Moody Trust agreed to be transferred is not valid and enforceable for the lifetime of Shearn Moody or is not assignable to Protective by Empire. Protective may, without prejudice to its rights otherwise under this Agreement, waive one or more of such conditions in a separate writing executed by its President.

#### *XIX. Conditions Subsequent.*

A. Protective shall have the right to terminate and rescind this Agreement and the assumption certificates, and upon rescission, Protective shall be absolutely relieved of all of its obligations thereunder, upon the happening of either of the following occurrences at any time within the time periods set forth below:

(i) any timely appeal from any order of the Circuit Court for the Tenth Judicial Circuit of Alabama in Case No. 171-687;

(ii) any lawsuit filed in any court in which a claim is made attacking this Agreement or its validity, whether or not Protective is a party to such lawsuit; provided that such lawsuit is filed within six (6) months of the entry of the final order of the Circuit Court for the Tenth Judicial Circuit of Alabama in Case No. 171-687 approving this Agreement. Upon the occurrence of the filing of an appeal as described in subparagraph (i) or a lawsuit as described in subparagraph (ii), Protective shall have fifteen (15) days following written notification to Protective by the Receiver (or any other written notice in fact received by Protective) of the filing of such an appeal or of such a lawsuit to elect to terminate and rescind this Agreement pursuant to this Section. If Protective shall fail to make such election to terminate and rescind this Agreement within said period of fifteen days, its obligations hereunder shall remain in full force and effect notwithstanding any such appeal or lawsuit.

B. In the event that any court shall enjoin or otherwise order or decree (preliminary or otherwise) Protective not to perform any or all of its obligations incurred under this Agreement, for however long as such injunction, order or decree shall be outstanding, Protective shall be absolutely relieved from performing any obligation incurred hereunder to the extent that such performance would result in a violation of any such injunction, order or decree; provided that Protective shall use its best efforts to have any such injunction, order or decree dissolved and set aside.

## XX. Other Provisions.

1. This Agreement shall insure to the benefit of and be binding upon the successors and assigns of Empire, Protective and the Receiver.

2. All prior or contemporaneous agreements and representations are merged into this Agreement, which, together with the exhibit hereto, constitutes the entire contract between the parties. No amendment or modification hereof shall be of any force or effect unless in writing and signed by the parties.

3. This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Alabama, except that it is agreed that the provisions of Section VI.A. and Section XVII, relating to arbitration of disputes hereunder, shall be governed by the Federal Arbitration Act, 9 U.S.C. § 1, *et. seq.*

4. Nothing herein, express or implied, is intended, or shall be construed, to confer upon or give any person, firm or corporation, other than Protective, Empire and the Receiver, any rights or remedies under or by reason of this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed as of the day and year first above written.

John G. Bookout, Commissioner of  
Insurance, State of Alabama, as  
Receiver for Empire Life Insurance  
Company of America.

ATTEST:  
W. C. Brannon  
Secretary

PROTECTIVE LIFE INSURANCE COMPANY  
By Wm. J. Rushton  
President



## EXHIBIT "A"

## CERTIFICATE OF ASSUMPTION

INSURED: \_\_\_\_\_

ORIGINAL POLICY NUMBER \_\_\_\_\_

ASSUMPTION NUMBER \_\_\_\_\_

This is to certify that Protective Life Insurance Company, pursuant to a Treaty of Assumption and Bulk Reinsurance (herein "Treaty") between John G. Bookout, Commissioner of Insurance, State of Alabama, as Receiver for Empire Life Insurance Company of America, Montgomery, Alabama, and Protective Life Insurance Company ("Protective"), hereby assumes all liability under the policy described above issued or assumed by Empire Life Insurance Company of America, in accordance with the conditions and terms hereof but subject to the more detailed terms and conditions specified in said Treaty, as of 12:01 A.M., C.S.T., the \_\_\_\_\_ day of \_\_\_\_\_, 197\_\_\_\_, subject to any defenses available to Empire Life Insurance Company of America on said date.

Whereas, Empire Life Insurance Company of America was insolvent as of the effective date of the Treaty and the assets of said Empire Life Insurance Company of America were insufficient to provide all benefits to policyholders and to pay all creditors, the Treaty imposes certain limitations on the rights of the policyholder of the policy assumed hereunder. Acceptance of such limitations by the policyholders is a condition precedent to this Certificate of Assumption becoming effective. Accompanying this assumption certificate is a summary of the more

important terms of the Treaty affecting the policyholder. Upon written request prior to December 31, 1975, Protective will supply the policyholder with a copy of the complete text of the Treaty, which is on file with the Commissioner of Insurance, State of Alabama. Among the conditions precedent to this assumption is the imposition of a temporary moratorium against the withdrawable values of this policy. The initial amount of the moratorium is 35% of the withdrawable values as of the effective date of the Treaty. This moratorium amount can never increase. The moratorium must terminate, at the latest, fifteen years from the date of the assumption; it may be cancelled prior to that time and under certain conditions may be reduced as often as annually. Such moratorium affects only the cash surrender and loan value, those options and privileges relating to such values (such as conversion, exchange, and partial withdrawal) and nonforfeiture benefits under the policy. Death and endowment at maturity benefits will be paid in full.

As a further condition precedent to the effectiveness of this assumption certificate, if the policy for which this certificate is issued is a participating policy or if for any other reason a claim may be asserted by virtue of said policy against the earnings of Empire Life Insurance Company of America, any predecessor or successor thereto, the Treaty specifically requires that all such dividend provisions, whether written or claimed to be implied, are amended by substitution of the following:

*Dividends.* Any dividend paid on this policy shall be as declared in the sole and absolute discretion of Protective and no contractual provisions or written or oral promise, express or implied, heretofore made to the policyholder shall

bind Protective to declare or pay any dividend. Protective may, at its sole option, declare no dividend or a dividend in such amount as it may deem advisable.

And furthermore it is required that the policyholder acknowledge that by failure to reject the assumption certificates he releases Protective from any claims, whether sounding in fraud, misrepresentation or otherwise, which might have heretofore been made by him or on his behalf relating to any dividend with respect to the policy. All premiums falling due subsequent to \_\_\_\_\_ shall be paid to, and all correspondence relating to this policy should be directed to, Protective Life Insurance Company at its home office in Birmingham, Alabama.

Protective shall have the right to terminate the Treaty and void this assumption certificate if enjoined by court order or if, within six (6) months of the approval of the Treaty, an appeal is taken against any order of the court which approved the Treaty or any lawsuit attacks the Treaty or its validity.

The policyholder may reject this assumption by filing such rejection in writing at the office of John G. Bookout, Receiver, Department of Insurance, Administration Building, Montgomery, Alabama 36104, within sixty (60) days after this assumption certificate was mailed. As a consequence of such rejection, this assumption shall be void and the policyholder will retain his rights against the receivership estate of Empire Life Insurance Company of America.

IN WITNESS WHEREOF, Protective Life Insurance Company has caused this certificate to be executed in its name and on its behalf by William J. Rushton, III, its President, and

attested by W. C. Brannon, its Secretary, both being thereunto duly authorized.

ATTEST:

W. C. Brannon  
Secretary

PROTECTIVE LIFE INSURANCE COMPANY

By Wm. J. Rushton  
President

## FIRST AMENDMENT TO TREATY OF ASSUMPTION AND BULK REINSURANCE

John G. Bookout, Commissioner of Insurance, State of Alabama (herein the "Receiver"), in his capacity as Receiver of Empire Life Insurance Company of America, an Alabama corporation, in receivership (herein "Empire"), and Protective Life Insurance Company, Birmingham, Alabama, an Alabama corporation (herein "Protective"), hereby amend the Treaty of Assumption and Bulk Reinsurance between them dated as of May 31, 1974, as follows:

1. The provisions of Paragraph III are hereby stricken and the following provisions are substituted therefor:

The Closing Date of this Agreement shall be June 1, 1974 unless such Date be hereafter extended in writing by Protective.

This Agreement shall not become effective or be binding on Protective in any way unless and until the Receiver shall have accomplished (1) the tender or furnishing of each and every item enumerated in Paragraphs VII D and XVIII hereof within the time limits therein specified as amended and (2) the transfer and assignment to Protective of all of the assets (or cash in lieu of assets) required to be transferred to Protective hereunder on or before the Closing Date. If the Receiver shall fail to have completely accomplished either (1) or (2) within said time limits, this Agreement shall never become effective and shall be totally null and void. Upon the Receiver's completely accomplishing both (1) and (2), this Agreement shall be effective as of

12:01 A.M., C.S.T. on January 1, 1974, which shall be deemed to be the Effective Date of this Agreement.

However, it is expressly agreed by the Receiver and Protective that during the period between the date upon which this Agreement is approved by the Court and the Closing Date, Protective, to the extent practicable, shall administer the affairs of Empire, invest such investable assets that are transferred to it prior to the Closing Date and otherwise be empowered to act as if the Agreement was closed except as to the provisions of Paragraph XIII, and all actions taken by it in good faith shall be binding on the Receiver in the event this Agreement does not become effective.

2. Paragraph VII A at line 5 on page 14 is amended by striking the words "fifteen year period" and substituting therefor the words "ten year period." Paragraph VIII D (3), line two, is amended by striking the words "fifteen (15) years" and substituting therefor the words "ten (10) years."

3. The provision at the end of Paragraph VII C (5) beginning with the words "and the Receiver further . . ." in the middle of the fourth line from the end of Paragraph VII C (5) on page 17 of the Agreement and ending with the words "under all such policies" at the end of Paragraph VII C (5) is stricken.

4. Paragraph VII is amended by adding the following as subparagraph D:

### D. Life Insurance

1. On or before the Closing Date, the Receiver shall transfer possession of each of the insurance policies described in Paragraph VII C (5) above to Protective and shall assign to



Protective absolutely and irrevocably the right to receive death proceeds from such policies in the amount of \$4,350,000 subject only to adjustment as provided in subparagraph D (3) below. Notwithstanding said transfer of possession of the policies, the Receiver shall remain the owner and beneficiary of said policies. Not less than 15 days prior to the Closing Date, the Receiver shall have accomplished all things necessary to: (1) make such assignments of proceeds to Protective in a form and with content acceptable to the issuer of said policies; (2) receive written acknowledgments from the issuer of notice of assignment; (3) provide for the absolute right by Protective to pay upon non-payment by the Receiver, prior to cancellation of any of such policies, the premiums of any and all of such policies upon written notice by the issuer that the Receiver has failed to pay any such premium; and (4) furnish satisfactory written evidence to Protective of having accomplished (1), (2) and (3).

2. Protective shall have first priority to any and all death proceeds paid under such policies up to the amount of said proceeds assigned to Protective. Should, for any reason, the death proceeds paid under said policies be less than the full face amount of said policies, nevertheless, Protective shall be entitled to and shall receive the whole amount of proceeds assigned hereunder (as may be adjusted) and there shall be no pro rata reduction of the proceeds payable to Protective on account of any failure to pay the entire proceeds of said policies.

3. On or before June 1 of each calendar year after 1974, the Receiver and Protective shall adjust the amount of the assignment of proceeds of said policies made hereunder so

that such assignment equals the then current value of the interest of Protective in the Libbie Shearn Moody Trust assigned hereunder as reflected in Protective's annual statement for the preceding year filed with the Alabama Department of Insurance plus any retained risk amount by Protective under said policies either as a result of assumption or as a reinsurer.

4. The Receiver shall pay all premiums on such policies and do all things necessary to keep each of said policies in full force and effect at all times. Upon a written statement from the Receiver, Protective shall reimburse the Receiver annually for Protective's pro rata share of such premiums based upon the ratio of death proceeds assigned to Protective to the total death benefits payable under such policies for such year.

5. If Protective, upon non-payment by the Receiver, pays the premiums on any of said policies, the Receiver shall immediately, free of any further consideration, transfer and assign all of said policies to Protective, free and clear.

6. The Receiver agrees to do all things reasonably within his power to obtain agreement of the National Western Life Insurance Company of Denver, Colorado and of the North America Life Insurance Company of Houston, Texas so that Protective may directly assume the interests of said companies in such policies and acquire from North America all of its rights under treaties of reinsurance relating to such policies between North America and Connecticut General Life Insurance Company and Lincoln National Life Insurance Company.

7. Receiver agrees that should he or the Court decide to

reduce or terminate the Receiver's interest in such insurance policies, he shall offer to assign and transfer to Protective free of any further consideration such interest in such policies as both owner and beneficiary as the Receiver or the Court determines should be relinquished and if Protective accepts such offer of transfer, Protective shall thereafter be responsible for all premiums on such policies. It is recognized that any decision by Protective with respect to such additional insurance shall be at its sole discretion, and Protective shall become the sole owner of and be named the sole beneficiary under any such part of insurance assigned. The Receiver shall not assign his interest either as owner or beneficiary in any said policies to any third party. Upon termination of the Receivership, the Receiver, upon the election of Protective in its sole discretion, shall transfer, assign and convey his entire interest as both owner and beneficiary of each of said policies to Protective free of any further consideration from Protective to the Receiver. Protective shall thereafter have sole discretion with respect to all matters concerning said policies, including, without limitation, the cancellation or reduction of benefits under said policies but shall also be responsible for all premiums on such policies.

8. No part of this amendment shall diminish the right of Protective under Paragraph XI D (2) to charge any and all premiums paid by Protective on such insurance as an investment expense of Empire. And benefits received under such policies by Protective shall be treated as assets added to the Empire Fund, or as Protective assets if the moratorium created hereunder has expired.

5. Paragraph VII is amended further by adding the following as subparagraph E:

E. The Receiver shall transfer, assign, deliver and convey to Protective all of the assets to be transferred hereunder on or before the Closing Date, provided that to the extent that the Receiver is, for reasons beyond his power and control, not able to transfer and assign title to one or more of such assets he shall, in lieu of any such asset, pay to Protective on the closing Date such amount of cash as shall equal the value of any and all assets not transferred as any such asset or assets are valued pursuant to the provisions of Paragraph VII C hereof. Said cash shall be held by Protective in escrow, but upon the Receiver transferring any asset not transferred at closing to Protective within two years from the Closing Date, Protective shall repay the Receiver such amount of said escrow funds as shall equal the value (as determined under Paragraph VII C) of any such asset transferred. Upon the expiration of two years from the Closing Date, any and all such funds in escrow shall vest in Protective absolutely and thereafter it shall have all right, title and interest thereto, and the Receiver shall have no further obligation to transfer the assets whose value is represented by such escrow.

6. Paragraph VIII D (1), line two, is amended by striking the words "one hundred five percent (105%)" and substituting therefor the words "one hundred eight percent (108%)," and Paragraph VIII D (1), line nine, is amended by striking the words "one hundred two percent (102%)" and substituting therefor the words "one hundred five percent (105%)."

7. The term "Effective Date" is amended to read "Closing

Date" in the second line of Paragraph XIII and wherever it appears in Paragraph XVIII.

8. Paragraph XVIII(e) (p. 43) is stricken in its entirety. The last three lines of Paragraph XVIII(g) beginning with the words, "and forms with . . ." are stricken in their entirety.

9. Paragraph XIX A shall be stricken in its entirety and in place of said provision the following shall be added:

A. The parties recognize that this Agreement will be executed pursuant to an Order of the Court in the case of *State of Alabama ex rel John G. Bookout, Comm'r v. Empire Life Insurance Co.*, Case No. 171-687 in the Circuit Court for the Tenth Judicial Circuit of Alabama, In Equity, and the Receiver cannot guarantee that the validity of this Agreement, in whole or in part, or any order in Case No. 171-687 relating to this Agreement may not be made an issue either in further proceedings in said case, including an appeal, or in other legal proceedings presently pending or hereafter to be filed.

The Receiver is unwilling to condition this Agreement on there being no such appeal or collateral proceeding, but hereby agrees to and shall reimburse Protective from the fund created for the Receiver in Article VII hereof for all expenses, including attorneys' fees up to a maximum of \$15,000 without Court approval and for such amounts in excess of \$15,000 as the Receiver and the Court shall approve, which Protective might incur on or after December 5, 1973 as a result of the protection of its interests, or in cooperation with the Receiver in protecting their joint interests, in Case No. 171-687 or in any appeal of Case No. 171-687 (whether or not Protective be a party thereto) or in any collateral legal proceeding

affecting (i) this Agreement, (ii) any order in Case No. 171-687 or (iii) otherwise affecting the affairs of Empire to which Protective may be a party or, if not a party, have an interest therein.

The Receiver and Protective agree to cooperate in any legal proceeding in which their interests may be aligned relating to this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed as of this 31st day of May, 1974.

John G. Bookout, Commissioner of Insurance,  
State of Alabama, as Receiver for Empire Life  
Insurance Company of America.

ATTEST:

Wm. C. Brannon  
Secretary

PROTECTIVE LIFE INSURANCE COMPANY  
Wm. J. Rushton  
President



## SECOND AMENDMENT TO TREATY OF ASSUMPTION AND BULK REINSURANCE

JOHN G. BOOKOUT, Commissioner of Insurance, State of Alabama (herein the "Receiver"), in his capacity as Receiver of Empire Life Insurance Company of America, an Alabama corporation, in receivership (herein "Empire"), and PROTECTIVE LIFE INSURANCE COMPANY, Birmingham, Alabama, an Alabama corporation (herein "Protective"), hereby amend the Treaty of Assumption and Bulk Reinsurance between them dated as of May 31, 1974 ("Agreement"), as follows:

### Recitals

1. Since Protective submitted the Agreement for acceptance by the Receiver, material developments have occurred with respect to Empire. Specifically, but without limitation, the assignability of Empire's interest in the Libbie Shearn Moody Trust has been questioned in a lawsuit filed by Shearn Moody, Jr. against The Moody National Bank and Empire in the District Court of Galveston County, Texas, and the hearing in the Circuit Court for the Tenth Judicial Circuit of Alabama for approval of liquidation of Empire as recommended by the Receiver and for acceptance of the Agreement, originally set for February 13, 1974, has been postponed until April 8, 1974, pending notification by mail of each Empire stockholder of the hearing. Protective offered the Agreement on the express condition that it be accepted by the Receiver and approved by the Court on or before January 31, 1974, and it is now apparent that such acceptance and approval cannot occur until after the hearing to be held April 8, 1974.

2. Protective desires to extend the time in which such accep-

tance and approval may be made through June 1, 1974, but only if the Receiver will agree to make appropriate adjustments in the initial Moratorium Amount established in Section VIII of the Agreement if it is determined that events transpiring since January 31, 1974 have adversely affected the condition of Empire and if the Receiver will enter into the agreements expressed herein.

3. In Section VI of the Agreement, Protective agreed to reinsure the Old National Policies subject to mutual agreement on the terms of such reinsurance. Since submitting the Agreement, the Receiver has insisted that the initial Moratorium Amount with respect to each Old National Policy to be reinsured be determined on the same basis as that of the Empire Policies to be reinsured. The value of assets to be transferred to Protective for the reinsurance of the Old National Policies and the reserves which must be established for such policies have not been determined by the parties, and the Receiver can make no warranty or assurance at this time that sufficient assets can be transferred from Old National to justify an initial Moratorium Amount for the Old National Policies equal to that of the Empire Policies. The parties therefore desire to make clear that some upward adjustment in the initial Moratorium Amount for all Assumed Policies may have to be made if Protective is to reinsure the Old National Policies with an initial Moratorium Amount equal to that of the Empire Policies.

### Agreement

NOW, THEREFORE, in consideration of the premises and the respective agreements of the Receiver and Protective herein contained, they hereby agree as follows:

1. The date for acceptance and approval of the Agreement as provided in Section II, p. 2 of the Agreement is extended to and through, but not beyond, June 1, 1974.

2. Immediately upon the acceptance of the Agreement, as amended, by the Receiver and its approval by the Court, but prior to the Effective Date, the Receiver shall transfer to Protective and Protective, as agent of the Receiver, shall assume possession and control of, and dominion over, all of the assets of Empire other than the Receiver's fund created in Section VII of the Agreement. Thereafter, Protective may, on behalf of the Receiver, sell dispose of, transfer, assign, invest, reinvest, and otherwise manage any and all of said assets, subject only to such restrictions as may be placed upon Protective by the Court by written order. The Receiver shall do all things necessary or desirable to accommodate Protective's administration of said assets hereunder. Said assets, while in the possession and control of Protective prior to the Effective Date shall not constitute a trust fund and shall not be subject to any laws, rules or restrictions which apply to investment of trust funds. It is expressly agreed that no claim of whatsoever kind will be made against Protective for alleged errors in judgment made in good faith in the management, sale, disposition, and reinvestment of said assets.

It is recognized by the Receiver that the interests of Empire will be best served by allowing Protective to commingle cash and equivalents received upon initial transfer to Protective of Empire assets or from the sale or transfer of Empire assets or from income produced by such assets or policies into fixed income investments (bonds, preferred stock, mortgages and similar investments) made by Protective in the management of its

own funds. Therefore, the Receiver hereby requests and authorizes Protective to commingle such cash and equivalents into Protective's fixed income investments and invest same in the same manner as Protective invests its own funds without segregating Empire's share from that of Protective. The value of Empire's share in such investments made with commingled funds shall be determined as provided in Section IX.B of the Agreement. Should Protective re-transfer Empire assets to the Receiver as provided for herein, the value of Empire's share in such commingled assets shall be computed as provided in Section IX.B and Protective shall re-transfer to Empire cash and/or fixed income assets (valued at their admitted value to Protective) purchased after transfer of the Empire assets hereunder, selected by Protective in its discretion, equal to the value of Empire's share so computed. Any dispute under the provisions of this paragraph shall be resolved by arbitration as provided in Section XVII of the Agreement.

3. Protective shall assume possession and control of and dominion over all Assumed Policies and, without reinsurance, shall administer all Assumed Policies. Such administration shall be carried out as if the Agreement were fully effective, subject to such modifications as the Court may prescribe, except that Protective shall reinsure no such policy and all payments on such policies shall be as if the Moratorium provisions of the Agreement required an initial Moratorium Amount based on 50% of the Withdrawable Funds of the policies as of September 15, 1972 rather than the 35% of the Withdrawable Funds as of the Effective Date. It is further agreed that unless paragraph 6 of this Second Amendment becomes effective, the initial Moratorium Amount of any Assumed Policy under the Agreement



shall not exceed fifty per cent (50%) of the Withdrawable Funds as of September 15, 1972.

4. To facilitate transfer of said possession, control and dominion under paragraphs 2 and 3 hereof, the Receiver shall transfer such of Empire's documents, records and other papers to Protective's offices in Birmingham, Alabama as Protective shall request. Protective shall at all times maintain appropriate books, records and ledgers with respect to said assets and policies, which shall be open to inspection of the Receiver or the Court and their representatives at any reasonable time.

Protective shall be empowered to change any and all procedures and records (including, without limitation, those relating to data processing) now in use by Empire as Protective, in its sole discretion, shall deem advisable.

The Receiver shall pay to Protective annually a fee for such administration prior to the Effective Date of the Agreement which (regardless of whether the Agreement otherwise becomes effective) shall be equal to the amount provided Protective after the Agreement becomes effective as set forth in Sections XI.B.5 and 6 and in Section XI.D to the extent the expenses specified in Sections XI.B.6 and XI.D.1 and 2 are not directly paid out of Empire funds.

5. Except as provided in the first four paragraphs of this Second Amendment, all of Protective's obligations under the Agreement as amended are expressly conditioned upon the determination by Protective that Empire's entire interest in the Libbie Shearn Moody Trust, as described in the Agreement, may be validly, lawfully and irrevocably assigned to Protective free and clear of any lawful or equitable claim or restriction. In

making such determination, Protective may rely exclusively on the opinion of its General Counsel, Cabaniss, Johnston, Gardner, Dumas & O'Neal. Upon such determination made by Protective in writing and delivered to the Receiver and upon the satisfaction in full of all other conditions to the Agreement as twice amended, all of Protective's other obligations under the Agreement shall forthwith become effective.

6. Except as provided in the first four paragraphs of this Second Amendment, prior to any of Protective's obligations under the Agreement as amended becoming effective and binding, Protective and the Receiver shall evaluate changes in the condition of Empire occurring after February 1, 1974, including, without limitation, lapses in premium-paying policies and any changes in the value or nature of Empire assets. If for any reason the condition of Empire has changed adversely from such date so as to justify an increase in the Moratorium Amount, Protective and the Receiver shall endeavor in all good faith to agree on the amount of such increase. If Protective and the Receiver fail to agree either that Empire's condition has changed adversely or on the amount the Moratorium Amount shall be increased, any such dispute shall be submitted to binding arbitration in accordance with the provisions of Section XVII of the Agreement. It is expressly understood that nothing herein is intended to or shall result in reduction of the Moratorium Amount.

7. Except as provided in the first four paragraphs of this Second Amendment, prior to any of Protective's obligations under the Agreement as amended becoming effective and binding, Protective and the Receiver shall determine as accurately as then possible the value of assets transferred or to be



transferred from Old National to Protective with respect to the reinsurance of the Old National Policies and the Empire Liabilities, as defined in Section X of the Agreement, on account of such policies. If the fair market value of the assets is insufficient in light of these liabilities on the Old National Policies to provide an initial Moratorium Amount consistent with that established for the Empire Policies, then Protective and the Receiver in all good faith shall seek to agree upon an appropriate increase in the initial Moratorium Amount for all Assumed Policies. If Protective and the Receiver fail to agree either that the value of the assets to be transferred is insufficient for reinsurance of the Old National Policies on the basis of such initial Moratorium Amount or, after such determination of insufficiency of value of assets, upon an appropriate increase in the initial Moratorium Amount, such dispute shall be submitted to binding arbitration in accordance with the provisions of Section XVII of the Agreement. It is expressly understood that nothing herein is intended to or shall result in a reduction in the initial Moratorium Amount as provided in Section VIII.A of the Agreement.

8. The Effective Date, which was set as January 1, 1974 in the first amendment, shall be redetermined by mutual agreement of the Receiver and Protective to reflect the date on which all the conditions set forth in the Agreement, the first amendment and this amendment are fully met. If all such conditions, including, without limitation, the condition stated in paragraph 5 of this Second Amendment, are not fully met by March 1, 1975, Protective may, at its sole option, terminate this Agreement effective forthwith and, upon ninety (90) days' written notice to the Receiver, re-transfer possession and control of all Empire

assets and Policies transferred to Protective, in which case all the terms and conditions of the Agreement shall forthwith be void and of no effect whatsoever, it being understood that the fee payable to Protective for administration shall be paid during such ninety day period. If all of such conditions are met prior to March 1, 1975 and if Protective and the Receiver shall fail to agree upon a revised Effective Date, such dispute shall be submitted to binding arbitration in accordance with the provisions of Section XVII of the Agreement.

I NWITNESS WHEREOF, the parties hereto have caused this instrument to be executed as of this 31st day of May, 1974.

JOHN G. BOOKOUT

John G. Bookout, Commissioner of Insurance,  
State of Alabama, as Receiver for Empire Life  
Insurance Company of America.

ATTEST:

W. C. BRANNON

Secretary

PROTECTIVE LIFE INSURANCE COMPANY

By WM. J. RUSHTON III

Its President

Executed in 3 Counterparts of which this  
is Counterpart No. 2

### THIRD AMENDMENT TO TREATY OF ASSUMPTION AND BULK REINSURANCE

JOHN G. BOOKOUT, Commissioner of Insurance, State of Alabama, in his capacity as Receiver of Empire Life Insurance Company of America, an Alabama corporation, in receivership, and PROTECTIVE LIFE INSURANCE COMPANY, Birmingham, Alabama, an Alabama corporation, hereby amend the Treaty of Assumption and Bulk Reinsurance between them dated as of May 31, 1974, as follows:

1. The time for acceptance and execution of this Treaty by the Receiver is hereby extended to and through June 24, 1974.

2. It is agreed that this Treaty and each of the three amendments thereto shall be executed in three counterparts, each of which shall be deemed an original.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed as of May 31, 1974.

JOHN G. BOOKOUT

John G. Bookout, Commissioner of Insurance,  
State of Alabama, as Receiver for Empire Life  
Insurance Company of America.

ATTEST:

W. C. BRANNON

Secretary

PROTECTIVE LIFE INSURANCE COMPANY

By WM. J. RUSHTON III

Its President

### FOURTH AMENDMENT TO TREATY OF ASSUMPTION AND BULK REINSURANCE

JOHN G. BOOKOUT, Commissioner of Insurance, State of Alabama (herein the "Receiver"), in his capacity as Receiver of Empire Life Insurance Company of America, an Alabama corporation, in receivership (herein "Empire"), and PROTECTIVE LIFE INSURANCE COMPANY, Birmingham, Alabama, an Alabama corporation (herein "Protective"), hereby amend the Treaty of Assumption and Bulk Reinsurance between them dated as of May 31, 1974 ("Agreement"), as follows:

#### Recitals

Under the provisions of Section VII of the Agreement, the Receiver agreed, on behalf of Empire, to convey to Protective "all assets" of Empire. Included among the "assets" are certain rights of action on behalf of Empire against its former officers, directors, agents, and parties acting in concert with them, for fraud, deceit, mismanagement or other misconduct. Notwithstanding said provision, it has been agreed between the parties that the Receiver shall prosecute any such right of action, including, without limitation, any and all claims made on behalf of Empire in the consolidated actions of Meyers, Haines and Bookout v. Moody, et al., presently pending in the United States District Court for the Northern District of Texas (CA Nos. 3-5678 and 3-7625-D). Although the Receiver will prosecute any such action, the parties have agreed that any Recovery (defined below) in any such Action (defined below) should rightfully and equitably be applied first to the benefit of the Empire policyholders by payment of the net of any such Recovery (defined below), in whole or in part, as provided

herein to Protective for reduction or elimination of the Moratorium Amounts established under the Agreement. It has been further agreed (1) that after payment to Protective of the Policyholder Amount (defined below), the Receiver may retain any excess, and (2) that a pro rata adjustment of the amount to be paid to Protective may be made (based on the Policyholder Amount) if necessary to prevent unlawful discrimination against non-policyholder creditors of Empire asserting valid and recognized claims.

NOW, THEREFORE, in consideration of the premises, and the mutual covenants herein contained, the undersigned parties hereby amend the Agreement and covenant and agree as follows:

1. As used herein, "Recovery" shall mean any net receipt of assets of any kind, including, without limitation, cash, by way of settlement, judgment, or otherwise, by the Receiver, any ancillary receiver, Empire, or any other person or entity for the benefit of Empire, resulting from any action filed or claim against any former officer, director, or agent of Empire, or any person or entity acting in conspiracy or concert therewith. As used herein, "Action" shall mean any action from which a "Recovery" results, including, without limitation, the consolidated actions referred to above. "Policyholder Amount" shall mean the greater of (a) the total of all Moratorium Amounts as computed under the terms of the Agreement or (b) the difference between the Empire Liabilities (excluding any adjustments for Moratorium Amounts) and the Empire Fund less (c) 120% of one year's annual premium income on all Empire Policies in force thirty days prior to payment of any Recovery to Protective.

2. The Receiver shall pay to Protective for the benefit of

the Empire policyholders and for credit to the Empire Fund for reduction of Moratorium Amounts the entire net amount of any Recovery, provided that (a) such payment shall not inequitably discriminate (based on the total of the Moratorium Amounts) against non-policyholder creditors of Empire asserting valid and recognized claims, and (b) subject to paragraph 3 hereof, such payment shall not exceed the Policyholder Amount. Any amount of Recovery which exceeds the Policyholder Amount may be retained by the Receiver for the benefit of shareholders and other claimants.

3. Notwithstanding the proviso contained in paragraph 2(b) above, if at the time of payment Protective has voluntarily reduced any Moratorium Amounts, or if such amounts are cancelled under the Agreement as a result of the expiration of ten years after the Effective Date, then the Receiver shall pay to Protective from any net Recovery the amount of any such voluntary reduction or cancellation of the Moratorium Amounts. In the case of any partial voluntary reduction of Moratorium Amounts, such payment shall equal the total of the amount of the voluntary reduction plus the Policyholder Amount.

4. The Receiver shall not enter into, nor shall he authorize any settlement of any Action without first having obtained the approval of such settlement by Protective, which approval may not be unreasonably withheld. The Receiver shall not initiate, or participate in negotiations toward settlement of any such Action without advising Protective of such negotiations and giving Protective an opportunity to attend and participate in such negotiations and all meetings pertaining thereto. The Receiver shall keep Protective advised of all material hearings in any Action.



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5. This agreement is conditioned upon the reinsurance and assumption of liability on policies of insurance by Protective pursuant to the Agreement as amended.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed as of May 31, 1974.

JOHN G. BOOKOUT,

John G. Bookout, Commissioner of Insurance,  
State of Alabama, as Receiver for Empire Life  
Insurance Company of America.

ATTEST:

W. C. BRANNON

Secretary

PROTECTIVE LIFE INSURANCE COMPANY

By WM. J. RUSHTON III

Its President